United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

31-5

278

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24944

LEONARD S. GOODMAN,
Appellant

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, and POTOMAC ELECTRIC POWER COMPANY,
Appellees.

JOINT APPENDIX

On Appeal From the
United States District Court
For the District of Columbia

LEONARD S. GOODMAN 04

7119 16th St. N. W.

WASHINGTON, D. C. 2001?

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COMPLAINT FOR INJUNCTIVE RELIEF
AND PETITION OF APPEAL
(As Amended)

The Plaintiff, Leonard S. Goodman, as and for his complaint and petition of appeal, alleges upon information and belief, except the first paragraph which is alleged upon knowledge:

1. This is an action pursuant to sections 43-704 through 43-710 of the District of Columbia Code to vacate and set aside a decision of the Public Service Commission of the District of Columbia authorizing and directing that retail electric service rates in the District of Columbia be increased by 11.24 percent. The Plaintiff, residing at 7119 Sixteenth Street, N.W., Washington, D.C. 20012, is a consumer of electricity in the District of Columbia and is affected by the decision approving the increase.

2. The defendant Public Service Commission of the District of Columbia, hereinafter Commission, was created under chapters 1 through 10 of Title 43 of the District of Columbia Code, and is the agency of the Government of the District of Columbia possessed of general jurisdiction and power of supervision over electrical corporations furnishing or transmitting electricity in the District of Columbia. Every public utility desiring to increase its rates for service must make prior application to the Commission pursuant to section 43-401 of the District of Columbia Code, and the said Commission may grant the application, in whole or in part, if it shall find the increase applied for is reasonable, fair and just.

3. The defendant Potomac Electric Power Company, hereinafter PEPCO or the company, is an electrical corporation, as defined by section 43-115 of the District of Columbia Code, and does business as such a corporation in the District of Columbia, Maryland, and Virginia. It is under the general jurisdiction and supervision of the Commission insofar as it does business in the District of Columbia.

4. On February 27, 1969, PEPCO filed an application with the Commission seeking to increase its authorized rate of return and its rates for electrical service in the District of Columbia. On April 24, 1969, the Commission issued a Public Notice describing the application, stating that hearings would be held, and inviting representations from the public. A copy of the Public Notice is set forth as Attachment No. 1 hereto.

5. Prior to these hearings, the company filed a further application with the Commission on August 5, 1969, this time seeking an immediate 6.5 percent addition to the basic charge for electrical service in the District of Columbia on an interim basis. The company alleged that an "emergency" existed and it sought the approval of the interim increase prior to hearings on its initial application. The Commission held hearings on this so-called "Emergency Application for Interim Relief" on September 10 and 15, 1969. These abbreviated hearings culminated in the Commission's interim Order No. 5402 of October 27, 1969, a copy of which is set

forth as Attachment No. 2 of this complaint and petition of appeal.

6. In Order No. 5402, the Commission held that PEPCO's revenues are sufficient to cover its operating expenses, to pay interest and dividends, and to attract capital. It stated that the company is "facing a period of unprecedented growth, with an attendant need for enormous capital investment." It deferred any further action on the "emergency" application.

7. At the conclusion of the hearings on the initial application, the company renewed its request for an interim increase. The Commission this time granted the request in Order No. 5419 of January 30, 1970, a copy of which is set forth as Attachment No. 3 hereto.

8. In Order No. 5419, the Commission again stressed that PEPCO must obtain and invest substantial amounts of new capital. It stated "that the cost of capital to PEPCO would be higher without some immediate improvement in its earnings picture," but did not state how much higher the cost would be. It added only that such "higher cost of capital ultimately would be borne by District of Columbia ratepayers." (p. 5). It authorized an increase of 5 percent, on an interim basis, or $4,083,026 per year in the rates for electric service in the District of Columbia, "since we deem the maintenance of the company's construction program to be of overriding importance." (ibid.).

9. The Commission issued a more lengthy "Findings,

Opinion and Order" in its Order No. 5429 of April 25, 1970, which comprised its final decision on the company's initial application, subject thereafter only to petitions for reconsideration. A copy of the order is Attachment No. 4 hereto. In Order No. 5429, the Commission concluded that District of Columbia rates should be increased on a permanent basis by a total of 12.5 percent or $10,220,758 per year. It noted that the interim increase was already producing $4,083,026 of this amount, and accordingly authorized and directed an additional increase of $6,137,762.

10. The Commission erred in its Order 5429 in concluding that the company was in need of over $10 million of additional revenues from its District of Columbia customers, in that,

a. the Commission understated the company's reasonably expectable increase in net operating income resulting from growth of its plant immediately following the test year;

b. the Commission overstated the company's rate base when it included a huge amount of construction work in progress taking into account none or only a small part of the future profit, or net operating income, when such new construction would be put in service; and in failing simply to capitalize interest during construction;

c. the Commission overstated the rate base by an arbitrary amount for alleged effects of inflation;

d. the Commission overstated the proper allowance to the company for Federal income taxes;

e. the Commission allocated to the District of Columbia an excessive percentage of the system-wide increase in rates allegedly needed by the company;

f. the Commission equated the symptoms of the company's healthy expansion with its supposed financial deterioration;

g. the Commission required the District of Columbia ratepayers to supply investment funds to the company, a function of bondholders and stockholders, but not of ratepayers.

11. The foregoing errors were described in detail to the Commission by the Plaintiff in his Petition for Reconsideration filed May 14, 1970. A copy of this petition is set forth as Attachment No. 5 hereto. The company responded to the Petition by merely addressing itself to procedure, rather than substance, and Plaintiff replied. The Commission denied the Plaintiff's Petition for Reconsideration in its Order No. 5434 of June 12, 1970, addressed to the substance of the Petition. A copy of Order No. 5434 is Attachment No. 6 hereto.

12. The Commission repeated the errors set forth in paragraph 10 above in its Order No. 5434 and hence erred in its decision to authorize and require an increase of $9,103,156 in the electric rates of the District of Columbia in that,

a. the decision is not supported by adequate findings;

b. the subsidiary findings do not provide the decision with a rational basis;

c. the decision is not supported by substantial evidence;

d. the decision reaches an unjust and unfair end result;

e. the decision approves unjust and unreasonable electric rates for the District of Columbia in violation of section 43-301 of the District of Columbia Code.

WHEREFORE, for the foregoing reasons, the Plaintiff prays:

1. The Court issue summons and process against the said defendants;

2. The Court receive the duly certified record of the proceedings before the Commission as the record on appeal pursuant to section 43-705 of the District of Columbia Code;

3. The Court enter an order and opinion setting aside and vacating the Commission's decision and remanding the matter to the Commission;

4. The Court direct an accounting and restitution of the increases collected by the company on and after February 2, 1970;

5. The Court grant such other and further relief as shall be just and equitable.

VERIFICATION

LEONARD S. GOODMAN, plaintiff in the above-captioned complaint and petition, being duly sworn, deposes and says, that,

1. He resides at 7119 Sixteenth Street, N.W., Washington, D.C. 20012.

2. He is a consumer of electricity in the District of Columbia and is affected by the decisions and orders of the Commission here in issue approving increases in electric rates.

3. This action is not collusive in nature or brought to confer jurisdiction on a court of the United States of any action of which it would not otherwise have jurisdiction.

4. He has read the Complaint for Injunctive Relief and Petition of Appeal and knows the contents thereof. The contents of the said complaint and petition are true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and to those matters, he believes them to be true.

POTOMAC ELECTRIC POWER COMPANY
MOTION TO DISMISS COMPLAINT
AND PETITION OF APPEAL

Potomac Electric Power Company, a defendant herein, by its attorneys, hereby moves the Court for an Order dismissing the Complaint for Injunctive Relief and Petition of Appeal, as

amended, filed herein by plaintiff Leonard S. Goodman and as reasons therefor says:

1. The Complaint and Petition, as amended, purports to appeal, pursuant to sec. 43-705 of the District of Columbia Code, 1967 Edition, Order No. 5429, dated April 15, 1970, issued by the Public Service Commission of the District of Columbia (the "Commission") in its Formal Case No. 541, as said order was amended by the Commission's Order No. 5434, dated June 12, 1970. Said Order No. 5429, as so amended, is not a "final order or decision of the Commission", and plaintiff Goodman is not a person "affected" thereby, within the meaning of said sec. 43-705. Therefore, said Order is not appealable by plaintiff Goodman.

2. The Complaint and Petition, as amended, purports to appeal, pursuant to said sec. 43-705, Order No. 5419, dated January 30, 1970, entered by the Commission in said Formal Case No. 541. Said Order No. 5419 is a final order of the Commission, within the meaning of said sec. 43-705 and within the meaning of sec. 43-704 of the District of Columbia Code, 1967 Edition, but no application for reconsideration thereof was filed with the Commission by plaintiff Goodman within thirty days after the publication of said Order No. 5419. Accordingly, said Order No. 5419 is now non-appealable by plaintiff Goodman.

ANSWER OF THE PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

Comes now the Public Service Commission of the District of Columbia, by its attorneys, and in answer to the Complaint, as amended, filed in the above-entitled action states the following:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff is not affected by the order of defendant Commission within the purview of Sec. 43-705, D.C. Code, 1967, permitting persons "affected" to maintain an appeal from a final order or decision of the Commission, in that the order appealed from is, by its own terms, interlocutory in nature and presupposes a final rate-making order from the Commission.

Third Defense

Defendant answers the numbered paragraph in the Complaint, as amended, as follows:

1. Defendant admits that this action purports to be pursuant to Sections 43-704 through 43-710, D.C. Code, 1967, to vacate and set aside an order of the Public Service Commission authorizing and directing that retail electric service rates in the District of Columbia be increased by

11.24 per cent, but denies that the plaintiff is entitled to such relief. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in the last sentence of Paragraph 1, but denies that the plaintiff is affected by the foregoing orders.

2. Defendant states that the allegations of Paragraph 2 of the Complaint are conclusions of law which defendant is not required to answer, but if required to answer, admits only that its powers are statutory, as set forth in Sec. 43-101, et seq., D.C. Code, 1967.

3,4. Defendant admits the allegations contained in Paragraphs 3 and 4 of the Complaint.

5. Defendant Commission admits the correctness of the factual allegations contained in Paragraph 5, but asserts it is not required to answer the characterizations contained therein, but if required to answer, defendant denies said characterizations.

6. Defendant Commission is not required to answer the allegations contained in Paragraph 6 because they constitute a partial paraphrase of Commission Order No. 5402, which Order is before the Court as part of the Certified Record and speaks for itself.

7. Defendant Commission admits the allegations contained in Paragraph 7.

8,9. Defendant is not required to answer the allegations contained in Paragraphs 8 and 9 because they constitute a partial paraphrase of Commission Orders Nos. 5419 and 542 which Orders are before the Court as part of the Certified Record and speak for themselves.

10. The allegations of error contained in Paragraph 10 and subparagraphs "a" through "g" are unsupported conclusions of the pleader which this defendant is not required to answer, but if required to answer, the allegations are individually and collectively denied.

11. Defendant Commission denies each and every allegation of error contained in Paragraph 11. Defendant is not required to answer the remaining allegations contained in the first and third sentences of Paragraph 11 because plaintiff's petition for reconsideration and defendant Potomac Electric Power Company's reply thereto are before the Court as part of the Certified Record and speak for themselves. Defendant admits the allegations contained in the second, fourth and fifth sentences of Paragraph 11.

12. Defendant Commission denies each and every allegation of error contained in Paragraph 12 and the subparagraphs therein

Further answering, defendant Commission denies all allegations in the Complaint not specifically admitted or otherwise answered.

Wherefore, defendant prays that an order be entered dismissing the Complaint.

ORDER

This matter having come before the Court upon the motions of the plaintiff and defendant Potomac Electric Power Company for summary judgment, and the motions of the defendants to dismiss, and upon consideration of the record of the proceedings before the Public Service Commission of the District of Columbia herein, the authorities cited by the parties and the arguments of counsel in open court, and it appearing to the Court that the plaintiff's complaint and petition of appeal should be dismissed, the Court, pursuant to District of Columbia Code sec. 43-705, hereby enters the following:

Statement of Reasons

Plaintiff has appealed, pursuant to District of Columbia Code sections 43-704 and 43-705, action taken by the Public Service Commission in its Formal Case No. 541. The plaintiff's complaint and petition of appeal fails to identify precisely the Commission Order or Orders which he is appealing. However, from his statement made in the course of his argument before the Court it appears that he is appealing only Order No. 5429, dated April 15, 1970 (as amended by Order No. 5434, dated June 12, 1970), but is asserting that such appeal also brings before the Court the interim rate increase authorized for the company by the Commission's

Order No. 5419, dated January 30, 1970.

As pertains to Order No. 5419, the Court finds that at the time it was issued it was a final order or decision which affected the plaintiff because it disposed of the application of the company for interim rate relief by authorizing the addition of a 5% surcharge on all bills for electric service, effective February 2, 1970, without requiring the company to obtain any further order before putting said surcharge into effect. By reason of the fact that plaintiff failed to petition the Commission for reconsideration of such Order or otherwise to perfect an appeal therefrom within the time limits and in the manner prescribed by law, the plaintiff may not do so now. The time to appeal the action taken by the Commission in said Order No. 5419 was not in any way extended by the subsequent issuance of Order No. 5429.

As pertains to Order No. 5429, as amended by Order No. 5434, the Court finds that said Order, being Phase I of the rate proceeding, was neither a final order or decision nor an order or decision which affected the plaintiff and that said Order is, therefore, not appealable. Said Order, by its terms, was preliminary and interlocutory in character, merely formulating the principles and setting the guidelines by which the company was to prepare and submit rate schedules to be the subject of further public hearings. See Leeman v.

Public Utilities Commission, 104 F. Supp. 553, rev'd on other grds., 213 F.2d 176 (1954).

The plaintiff was not affected by any order (other than 5419, discussed above) until the entry of Order No. 5436 on June 29, 1970, which latter Order was the final order approving the rate schedules and ordering the same into effect. Said Order No. 5436 was so entered two weeks after the filing herein of the plaintiff's complaint and petition of appeal and with respect to it no petitions for reconsideration and appeal have ever been filed by the plaintiff. Accordingly, Order No. 5436 is not, and cannot properly be brought, before the Court.

ORDER

Therefore, upon consideration of the foregoing, it is by the Court this 11th day of December, 1970,

ORDERED, that the motions to dismiss made by defendants Potomac Electric Power Company and Public Service Commission of the District of Columbia be, and the same hereby are, granted; and it is further

ORDERED, that the plaintiff's complaint and petition of appeal be, and the same hereby is, dismissed with prejudice.

EXTRACT FROM THE TRANSCRIPT
OF
PROCEEDINGS
HELD OCTOBER 7, 1970

Tr. 3

THE DEPUTY CLERK: Leonard S. Goodman v. Public Service Commission of the District of Columbia, et al., Civil Action No. 1777-70.

Mr. Goodman for the plaintiff, Mr. Trimble, Mr. Means, Mr. Donnella and Mr. White for the defendants.

Are counsel ready?

MR. GOODMAN: Counsel for the plaintiff is ready.

THE COURT: I think we have pending two motions for dismissal, one on the part of Pepco and one on the part of the District of Columbia. We also have, Mr. Goodman, a motion for summary judgment on your part, is that correct?

MR. GOODMAN: Yes, sir. Also a cross motion filed by the company for summary judgment.

THE COURT: We will hear you on the motion for summary judgment, Mr. Goodman.

MR. GOODMAN: Thank you.

Your Honor, I think I could best begin by describing the rates that I believe are before the Court as a result of the filing of the plaintiff's petition for appeal in this case, which should also serve as my answer to the defendants' motions to dismiss.

Pepco's initial application for a change in rates was filed with the Commission on February 27, 1969.

Before the hearings could be held, Pepco filed a so-called emergency application in August of 1969.

Now, the Commission denied this application. It denied the relief without prejudice to its renewal after all the hearings on the initial application.

And those hearings were, in fact, held in the fall and winter of 1969. And the company thereafter renewed its request for an interim increase, subject to making a refund if the increase were not sustained in the final decision.

And the fact that this interim increase would be subject to a refund was made known on the record at transcript pages 35, 196 and 197.

The Commission granted this interim five per cent increase effective February 2, 1970, in an Order No. 5419. This order is attachment No. 3 to the complaint, and has not been appealed.

The Commission in that order simply granted an increase to enable the company to borrow money on more favorable terms. It specifically refused to decide any of the issues of the case, such as rate base or rate of return.

It stated that if there was an excess, it would be subject to a refund later, and stated on page 7:

" ... we will discuss these subjects in detail in our Phase I order."

So much for Order 5419

In Order 5429, which is the order here on appeal and is Attachment No. 4 to the complaint, the Commission decided with finality each of the substantive issues regarding the alleged need for an increase in rate.

Moreover, the Commission in that order approved the interim five per cent increase on a permanent basis, thereby cutting off all rights to refunds, and it further ordered the company to file a schedule permanently increasing the rates.

Of course it later issued another order. This later order, which has not been appealed, simply regards how the overall increase, which had been approved in 5429, how that overall increase should be distributed among Pepco's customers on a permanent basis.

The Commission began that last order by saying well, we had already "determined the amount of the revenue increase."

Now, plaintiff's appeal from Order 5429 is an appeal from a final decision regarding the amount of revenue increase to be allowed Pepco.

As the Court of Appeals stated in the Baker case:

> A reviewing court need not reach questions regarding discrimination between users when the issue on appeal is the company's need for any increase.

This is 138 F. 2d at page 23.

Thus this Court need not reach any question raised by Order 5436, that last order. And this appeal from Order 5429

is also an appeal from the decision finally approving the increase allowed back in February.

The February increase was an interim one. Their Order 5429 made it permanent and allowed the company to incorporate that February increase in the permanent schedule of rates.

I refer here to page 44 of Order 5429, where the Commission says that it had allowed the 5% increase in February, and we will now allow the company to increase the rates further.

Now, allowing this appeal raises no inconsistency with the Leeman case, which is relied upon by the defendants.

Judge Holtzoff characterized an order similar to the last order in this case as the "final order" in that case. His holding was that the United States, as an appellant, might appeal that last order and thereby bring up questions that have been decided in prior orders.

He never said, however, -- he never said -- that the United States was barred from appealing any of the prior orders.

And I should also add that in Leeman there was no interim increase, and hence no decision, as here, making the interim increase permanent.

But let's assume that Order 5436, the last order issued by the Commission here, deciding how to spread this increase among the rate bearers is the only final order in the

case, nevertheless the statute, on its face, permits an appeal from a final decision as well as a final order.

THE COURT: By one affected.

MR. GOODMAN: By one affected. That's true.

And since Order 5429 is a final decision on all substantive issues before this Court, the plaintiff is affected by what the Commission said in Order 5429.

THE COURT: Suppose 5436 had never come out, because of some emergency that 5429 had never been implemented?

MR. GOODMAN: That's a good question, Your Honor. That is the risk that the United States ran in the Leeman case when it waited for the last order in the case. Because it could have happened here that the Commission would simply have sat on the proceedings and have let this company continue to collect that interim increase for the next year.

THE COURT: The interim increase was never challenged you filed a petition for reconsideration, I think, out of time?

MR. GOODMAN: No, I never filed a petition for reconsideration of Order 5419, I only filed a petition for reconsideration of Order 5429.

THE COURT: Of Order 5429?

MR. GOODMAN: That's right.

THE COURT: Then Order 5419 was never questioned?

MR. GOODMAN: It was never questioned as an interim increase. It was questioned in so far as 5429 incorporated

5419 and permitted 5419 to continue on a permanent basis and cut off all right to a refund relating to 5419.

In other words, the Court's attention is directed to 5429 in this case, 5429 decided all substantive issues that are before this Court.

It decided that that interim increase is to be a permanent increase, the company is to keep it, not only from the date that the Commission issued 5429 but beginning in February on a permanent basis, and it cuts off all rights to refunds.

That's why 5429 is the order in issue in this court.

5436 does one thing: It decides whether there is any discrimination among the rate payers in the distribution of the increase that the Commission had already decided the company was entitled to in 5429.

This Court doesn't have to reach any question of discrimination.

THE COURT: Isn't it perfectly possible that a rate structure filed pursuant to 5429, the second phase of the hearing, that a rate structure could have been evolved that conceivably might have let you out entirely from any rate increase?

MR. GOODMAN: It might have been possible with respect to 7-1/2 per cent of the 11 per cent increase, but the 5 per cent which had already been allowed in February was then affecting this plaintiff at the time the 5429 was issued.

THE COURT: Five per cent was affecting the plaintiff because in 5429 they did nothing to undermine what they had done in 5419, 5419 was permitted to continue in effect, isn't that right?

MR. GOODMAN: It was not only permitted to continue, but the Commission gave its subsequent blessing to 5419 and made it permanent.

THE COURT: 5419 could have been questioned, couldn't it? I mean, that was a final order, too?

MR. GOODMAN: It could have been questioned in terms of whether it was permissible as an interim matter. It could not have been --

THE COURT: As an interim matter or a final matter, it was a rate that took effect on the 2nd of February.

MR. GOODMAN: Yes, sir.

THE COURT: And as far as the user was concerned, it was at that moment that he became affected.

MR. GOODMAN: He was affected as of February 2nd, 1970. That's true.

THE COURT: Well, in view of your previous answer, you apparently concede that it would have been perfectly possible with respect to 7-1/2 per cent of the total 11-1/2 or 12 per cent for Pepco to have devised a rate structure which eliminated people in your class from a further burden?

MR. GOODMAN: This assumes, of course, that I would have some burden of showing standing as actually paying the rate increase, rather than representative.

THE COURT: It is effective until you have to pay, Mr. Goodman.

MR. GOODMAN: But this is also an appeal from a Commission order. And I think it was sufficient that I was affected by 5429, making 5419 permanent, to establish that I was affected by 5429 on a monetary basis. It made 5419 permanent. It said I could no longer apply to the company for a refund. I was affected by what the Commission said in 5429.

THE COURT: But your time for filing for a refund in relation to filing an appeal from 5419 expired, didn't it?

MR. GOODMAN: Oh, no, not at all, sir. I had no right to apply for a refund as long as the merits of the proceeding were pending before the Commission and remained undecided. And the merits were only decided in 5429.

Let's assume that the Commission had said in 5429, as it should have, that this company is a healthy, well-established company and needs no increase, then the relief that the Commission should have granted me in 5429 was to have required Pepco to make a refund to me and the others, and 5429 was the proper vehicle for that relief.

Finally, the purposes of the doctrines of finality and rightness and exhaustion of administrative remedies and all

of those are to make certain that issues aren't brought prematurely before the courts, but the defendants are seeking to use this doctrine to insulate the Commission's decision from all judicial review, and I think that is improper.

* * * * * * * * Tr.54

THE COURT: Well, I am going to deny the plaintiff's motion for summary judgment; and grant the motions to dismiss filed by Pepco and the District of Columbia, on the ground that 5429 from which appeal has been taken was not a final order and is therefore not appealable; that 5419 was a final order which was never appealed from; that 5436 which set the rate structure and did some other things is a final order, and no petition to reconsider having ever been filed in that case as a prerequisite to taking an appeal, that order is not before the Court. It was not until the entry of 5436 setting the rate structure that the plaintiff was an "affected person" within the meaning of the statute. Tr. 55

I recognize that this is a narrow ground of decision, but it is precisely the ground that Judge Holtzoff took in the Leeman decision in denying Pepco's motion to keep the government from appealing in another rate case, on the theory that the government in appealing a phase two order should have appealed from the order in the phase one proceeding.

AFFIDAVIT

LEONARD S. GOODMAN, being duly sworn upon his oath deposes and says:

1. That he currently resides in the District of Columbia and has been a resident and consumer of electricity in the District continuously since about 1959.

2. That he is a consumer by the payment of electric bills at both his residence and at other properties in which he has an interest in the District.

3. That his electric bills are subject to both the residential or "R" schedule of rates, and the general service or "GS" schedule of rates.

4. That on and after about February 2, 1970, he was charged and paid an additional 5% surcharge in his electric utility bills not theretofore charged to him or paid by him.

5. That on and after about July 1, 1970, his electric utility rates were increased further per kilowatt hour.

This the 12th day of October, 1970.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 5419

January 30, 1970

IN THE MATTER OF	)	
	)	
Application of POTOMAC ELECTRIC POWER COMPANY for an increase in rates for retail electric service.	)	Formal Case No. 541
	)	
	)	

On August 5, 1969, the Potomac Electric Power Company (Pepco) filed an "Emergency Application for Interim Rates". Hearings were held and on October 27, 1969, we issued our Order No. 5402, dealing with the Emergency Application. We felt that we should not make any rate changes without an opportunity for full hearings but we recognized that problems could arise for Pepco if the proceedings took too lengthy a period. Accordingly, we directed that the Emergency Application be held sub judice pending further proceedings. At the conclusion of the hearings on Phase I, Pepco renewed its Emergency Application, seeking interim rate changes on an expedited basis. A similar motion has been filed with the Maryland Commission and we have coordinated our disposition of the matter with them.

We have given the Emergency Application close and thorough consideration and we have concluded that we should act favorably upon it at this time. The major change in the situation since we issued our Order No. 5402 is the completion of the Phase I hearings. We had felt most reluctant to take any action with regard to rates without providing ample opportunity to all interested parties to develop a full and thorough record. That opportunity has now been provided. Most significantly, the facts developed on that record permit a sound basis for action now.

The record covers four matters of basic significance. These are: (1) net operating income; (2) rate base; (3) test year; and (4) a fair and reasonable rate of return. The evidence concerning these four areas is not agreed upon or uniform. However, it does form a range of figures; and that range reveals the need for modifications in rates.

Order No. 5419, page 2.

With respect to the income figures, there is little, if any, dispute on this record that Pepco's net operating income has declined steadily during 1968 and 1969. While there are no figures in the record with respect to 1970 operations, there is credible testimony that without rate adjustment, there is no reason to expect a significant change in Pepco's net operating income trend this year. The figures set out in the record are referred to in the following discussion.

On the rate base issue, Pepco has urged use of a year-end rate base. Our staff has recommended that we adopt a weighted or average rate base. The record also indicates a difference of opinion between Pepco and our staff with respect to the appropriate test year. For purposes of disposing of the interim increase request, however, we do not find it necessary to resolve either of these issues at this time.

Similarly, we do not find it necessary for the limited purpose of this order to make a final determination of a fair and reasonable rate of return for Pepco. As in the case of the rate base and test year issues, there are differences of expert opinion displayed on the record which offer the Commission a range of from 6.69% to 7.9% as a fair and reasonable rate of return.

Turning now to the range of figures presented to us, the lowest rate base and the lowest rate of return for which there is support in the record are, respectively, the calendar year 1969 weighted rate base of $753,837,000 and the rate of return of 6.69% recommended by OSA. If we were to use those figures for the purpose of disposing of the Emergency Application, mathematical calculation reveals that Pepco's 1968 operating revenue fell short of the indicated revenue need by $3,715,000.1/ Moreover, the figures presented concerning the trend in 1969 indicate that an even greater deficiency was in the making. Nonetheless, taking the figures as presented, to obtain this amount of additional revenue through a surcharge, as suggested by Pepco, would require an increase in electric rates of 4.21%.

On the other hand, if we were to accept the highest recommended rate of return (7.9%), and apply it to the unweighted rate base as of June 30, 1969, Pepco's indicated revenue deficiency would be approximately $36,194,000, and its elimination would require a 20.49% increase in rates.2/

1/ See Appendix A.

2/ See Appendix A.

Not even Pepco, however, seeks an interim increase of that magnitude. Its Emergency Application seeks interim rates which would produce a 6.60% rate of return on an unweighted rate base, not including cash working capital, as of June 30, 1969. The result of mathematical calculations using these factors indicates a surcharge requirement of 6.13%, or $10,825,000.3/

The Commission staff has submitted evidence in this proceeding recommending use of a weighted rate base for the 12 month period ended June 30, 1969, and a rate of return of from 7.02% to 7.38%. If, on final decision, we were to accept the staff recommendation with respect to rate base and its minimum recommended rate of return, an increase in electric rates of 7.10% or $12,530,000 would be indicated.4/

Thus, the record shows that Pepco's present rates produce a deficiency in net operating income ranging from $3,715,000, at the least, to $36,194,000 at the most. Under no method urged by any party can it be said that Pepco's present rates produce an adequate rate of return. There is no evidence in this record, therefore, which would support a factual finding that Pepco's existing rates are just and reasonable, as those terms are used in our statute (D.C. Code, Sec. 43-301). We are compelled to find, therefore, and we do find, based on the evidence summarized above, that Pepco's existing rates are insufficient, and therefore an increase in these rates must be authorized.

In the ordinary course, such a conclusion would be followed, first, by an order setting forth detailed conclusions as to the proper rate of return, the rate base to which it should be applied, and the resulting revenue requirement. That order would be followed by further hearings on the appropriate changes in rates to produce the required additional revenues and the issuance of a second order detailing the specific rate changes. We believe that circumstances here presented warrant departure from that course of action.

We have reference to the extremely important obligations faced by Pepco in respect of meeting new and increased customer demands for

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3/ See Appendix A. Pepco's application requested a 6.5% surcharge. The 6.13% figure is the result of adjusting the data presented in the application to reflect the recent change in the Federal income tax surcharge.

4/ See Appendix A.

electric service.5/ Pepco has been experiencing recurrent difficulties in meeting existing demands. The record reflects the "brown-out" of August 18, 1969, and the Commission must take official notice of the voltage reduction taken by Pepco during the last week of December, 1969. The testimony of the Commission's chief engineer in this proceeding strongly suggests that even under the best conditions, Pepco's generating capacity is now barely adequate to meet peak demands on its system. That situation can only be overcome by an aggressive program of construction and improvement to meet growing demand. Such a program calls for investment of huge sums of money.

It seems clear, therefore, that Pepco must now obtain and invest substantial amounts of new capital in generation, transmission and distribution facilities. The contruction of these facilities is vital for the preservation of adequate and reliable service for customers within the District of Columbia. There is no question on this record but that the cost of capital has increased substantially over the last several years, and that the attraction of capital on favorable terms is today a serious problem for all business enterprises. It is also undisputed that capital costs are higher for those whose growth prospects and earnings potentials are lower than those of enterprises with which they must compete in the money markets.

Given the facts in this record with respect to Pepco's declining earnings, and the fact that its present earnings levels are inadequate by any reasonable standard, it is the Commission's opinion that at this time

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5/ The record shows that Pepco's earnings were sufficient to meet its payroll and other operating expenses, together with interest on its debts and dividends on its preferred stock. The substitution of stock for cash dividends on Pepco's common stock does not appear to have been necessitated by an inability to meet the dividend requirement from current earnings, but was rather a management decision based on reasons not fully explained in the record. We do not believe, however, that these facts, viewed against a background of declining earnings, are persuasive of the view that rates which we have found insufficient should be required to be maintained for such period of time as may be required to complete this proceeding. The Commission has an obligation, as it has previously recognized, to authorize rates that will produce earnings which are fair and reasonable to both the ratepayer of the District of Columbia and to Pepco. That obligation is not met by agency inaction until payrolls and other current financial obligations cannot be met.

Pepco would experience considerable difficulty in attracting capital on favorable terms. This is not to say that Pepco would be totally unable to attract the capital needed to finance its needed new construction. We are convinced, however, that the cost of capital to Pepco would be higher without some immediate improvement in its earnings picture, and that this higher cost of capital ultimately would be borne by District of Columbia ratepayers.

Since we deem the maintenance of the company's construction program to be of overriding importance, and since we are aware that the issuance of new securities is necessary in the very near future in order to maintain that program, 6/ we feel constrained to act more expeditiously than we would normally do on our conclusion that Pepco's present earnings levels are inadequate. On balance, therefore, the Commission concludes that authorization of interim rate relief for Pepco now is fully warranted on the record made in Phase I of this proceeding.

There remains the very important question as to how much rate relief we should grant on an interim basis. As in all rate questions, we must balance the interests of both Pepco and its customers. As noted above, the record offers a range of increase from $3,715,000 to $36,194,000. Within this range, a variety of calculations can be made, using rates of return from 6.69% to 7.9% and weighted and unweighted rate bases for test periods covering 1968 and much of 1969. For purposes of interim rates, the Commission concludes that both extremes are to be avoided, and that it would, in fact, be improper to authorize a greater interim increase than that sought by Pepco. This amount, as shown above, is $10,825,000, on a system-wide basis which, translated into rates, would require a 6.13% increase in rates. This would produce a rate of return of 6.68% on a June 30, 1969, unweighted rate base without cash working capital.

We do not believe, however, that we should grant an interim increase of that magnitude. We wish to be certain that in changing rates on an interim basis, by imposing a uniform surcharge, we are not asking any customer to pay any more than could be justified by any reasonable standard. We have tested the effect of a variety of increases and we have concluded that a 5% interim increase should be authorized. Using year ended June 30, 1969 data, such an increase would produce additional

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6/ In fact, Pepco filed an application with us on January 27, 1970, seeking approval for the issuance of $35,000,000 in bonds and $30,000,000 in preferred stock.

revenues of $8,830,000.7/ This amount, added to revenues for that year, would result in earnings at a rate of 6.80% on a weighted rate base for that period. Such a return is only slightly above the 6.69% level recommended by the GSA rate of return witness -- the lowest recommendation in the record.8/ It is well below the rate of return levels in excess of 7% recommended by both the staff and the company experts. By any standard, the rate of return thus produced cannot be said to be excessive. A 5% increase in electric rates represents 7 1/2¢ a month on the minimum bill; 15¢ a month on the typical lighting, small appliances and refrigeration customer; 32¢ a month on the typical lighting, appliances, refrigeration and cooking customer; and 64¢ a month on the typical lighting, appliances, refrigeration, cooking and water heating customer. The average residential customer within the District of Columbia will pay 42¢ more a month. The average commercial service customer will pay $6.61 a month more. The average large power customer will pay $567.42 a month more. The earnings which a 5% interim increase will produce, in our opinion, would permit Pepco to market such securities as may be needed to finance necessary construction in this interim period on favorable terms, while at the same time would not require Pepco customers to pay excessive rates, or rates which might, under our final decision, require refund.

In our discussion thus far, we have focused upon the traditional analysis of operating revenues, rate base, and rate of return. In considering the appropriateness of interim rate relief, we have also taken into account the arguments urged by some parties to the proceeding that we should refuse any rate increase whatever on the basis of certain considerations apart from revenues, rate base, and rate of return. We will treat all of these arguments at length in our order dealing with Phase I of this proceeding. However, we deem it appropriate to indicate briefly at this point our thinking on the arguments presented to us.

There is, first, the question of Pepco's employment practices. Suffice it to say that the testimony of record with respect to these practices is deeply disturbing to the Commission and although we are

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7/ Based on revenues for the year ended June 30, 1969, the additional revenue from customers within the District of Columbia will be approximately $4,083,000 per annum. Of this total, $830,000 will be borne by residential customers in the District of Columbia.

8/ The GSA witness never stated which rate base he would use in connection with his rate of return. We assume from GSA's approval of the staff presentation that they would accept application to the weighted rate base as of June 30, 1969.

not persuaded that the evidence of record, considered in the context of a rate case, would support exercise of our authority to deny any rate increase, the issue of employment practices will be the subject of a full treatment and the fullest exercise of the Commission's authority in its final order of this phase of the proceeding.

Next, there is the argument that we should deny a rate increase now on the basis of Pepco's earnings during the years since our 1966 rate order. We find the answer to this contention in the decision of the Court of Appeals in Washington Gas Light Co. v. Baker, 188 F. 2d 11 (D.C. Cir. 1951), cert. den. 340 U.S. 952. That case holds that a fair and reasonable return for any given period cannot be assumed but must be based on evidence of record with respect to the period in question. (Ibid, pp. 17, 23.) We cannot at this time, therefore, find Pepco's earnings either excessive or unlawful in years subsequent to our last rate case merely because in those years Pepco earned from .1% to .4% above the 6.3% found reasonable in that case. There is no evidence in this record indicating that local and national economic conditions and the risk factor have remained static during the intervening years, or with respect to what would have been a fair and reasonable return for the intervening years. We find no basis in this argument for denying rate relief at this time.

We have also considered the question of jurisdictional allocations. As has been pointed out by all of the parties to this proceeding, our responsibility is limited to rates for service within the District of Columbia. We have therefore thoroughly considered and reviewed the questions of jurisdictional cost of service, and we find that on this record there is no showing of any significant difference in cost of service to customers in Maryland, the District of Columbia or Virginia. Under these circumstances, it is proper that we treat Pepco on a system-wide basis. Also, since the rates last prescribed by the Commission are presumed just and reasonable, a uniform interim increase in those rates also appears reasonable.

Again, we wish to emphasize that we will discuss these subjects in detail in our Phase I order. Our objective here is simply to indicate that we have considered the arguments and find no basis in them on which to deny interim rate changes.

To sum up, therefore, we have found that the completed record in Phase I of the rate proceeding justifies the conclusion that Pepco's existing rates are, by any standard urged in the hearing record, insufficient. We have further found that the financing requirements which arise from Pepco's urgently needed construction program necessitate rate

relief now. We should not wait until the completion of further proceedings before taking action to afford Pepco an opportunity to improve its earnings picture. Finally, we have found that a 5% surcharge on all existing rates will produce a rate of return of 6.8% on a weighted June 30, 1969 rate base, a rate of return which cannot be regarded as excessive by any standard, but which should be adequate on an interim basis, to permit Pepco to implement its current financing program. We further intend to continue to press forward with the proceedings so that final action can be taken at the earliest possible date.

There remains only the question of timing the institution of the rate change. We believe that it should go into effect at the earliest possible time but that it should not be given retroactive effect. Accordingly, we will direct that it become effective for service rendered on and after February 2, 1970.

For purposes of this interim order, and on the basis of the evidence of record in this proceeding, as discussed in the foregoing analysis, the Commission finds that:

1. Pepco's existing rates are insufficient to provide the earnings required to enable it to obtain, on favorable terms, the additional capital needed to finance its construction and improvement program;

2. Pepco's construction and improvement program must be aggressively implemented if Pepco is to meet peak demands on its system and to provide adequate and reliable service to its District of Columbia customers;

3. Implementation of this program requires that Pepco obtain additional capital immediately;

4. An immediate rate adjustment would provide an opportunity for Pepco to obtain this necessary capital on more favorable terms;

5. There is no significant difference in Pepco's cost of service to customers in the District of Columbia, Maryland and Virginia;

6. A uniform interim increase in Pepco's existing rates is just and reasonable;

Order No. 5419, page 9.

7. A 5% surcharge on all existing rates will provide interim earnings sufficient to permit Pepco to achieve its immediate financing objectives, without requiring Pepco customers to pay excessive rates;

8. Existing rates plus a 5% surcharge are just and reasonable on an interim basis.

THEREFORE, IT IS ORDERED:

Section 1. That Potomac Electric Power Company be, and it is hereby, authorized to add to all bills for electric service furnished by it to customers in the District of Columbia on and after February 2, 1970, and until further order of the Commission, a surcharge in the amount of 5% of such bills.

Section 2. That the Potomac Electric Power Company is directed to file amended tariffs on or before February 2, 1970, to implement the preceding ordering paragraph.

By the Commission:

James H. Bohannan
Executive Secretary

A TRUE COPY:

Chief Clerk

APPENDIX A TO ORDER NO. 5419
Calculation of Various Surcharge Requirements

36

Line No.			Lowest Rate Base and Rate of Return (a) 12/31/68	Highest Rate Base and Rate of Return (b) 6/30/69	Pepco Emergency Application (c) 6/30/69	Staff Presentation (d) 6/30/69
1.	Test Year Ended					
2.	Rate of Return	%	6.69	7.90	6.68	7.02
3.	Rate Base	$(000)	753,837	854,341	841,499	799,966
4.	Return to be Earned	$(000)	50,432	67,493	56,212	56,158
5.	Return Earned During Test Year	$(000)	48,653	50,156	51,027	50,156
6.	Deficiency in Return	$(000)	1,779	17,337	5,185	6,002
7.	Tax Factor	%	47.89	47.90	47.90	47.90
8.	Deficiency in Revenue	$(000)	3,715	36,194	10,825	12,530
9.	Revenue in Test Year	$(000)	168,039	176,602	176,602	176,602
10.	Surcharge Required	%	2.21	20.49	6.13	7.10

APPENDIX A TO ORDER NO. 5419

37 Sources:

Line No.

1. a) Staff Exhibit 2; b) Staff Exhibit 3; c) Pepco Interim Exhibit 1; d) Staff Exhibit 7 (Rev.)
2. a) GSA Exhibit 4; b) Pepco Exhibit 4; c) Pepco Interim Exhibit 1; d) Staff Exhibit 7 (Rev.)
3. a) Staff Exhibit 2, Schedule 6 (Rev.); b) Staff Exhibit 3, Schedule 6 (Rev.); c) Pepco Interim Exhibit 1; d) Staff Exhibit 7 (Rev.)
4. a), b), c), d) Line 2 x Line 3.
5. a) Staff Exhibit 2, Schedule 6 (Rev.); b) Staff Exhibit 3, Schedule 6 (Rev.); c) Pepco Interim Exhibit 1; d) Staff Exhibit 7 (Rev.)
6. a), b), c), d) Line 4 - Line 5.
7. a) Pepco Exhibit 2 Pg. D-2.6 Adjusted for change in F.I.T. surcharge rate; b) Staff Exhibit 7 (Rev.); c) Pepco Interim Exhibit 1D Adjusted for change in F.I.T. surcharge rate; d) Staff Exhibit 7 (Rev.)
8. a), b), c), d) Line 6 + Line 7
9. a) Staff Exhibit 2, Schedule 2; b) Staff Exhibit 3, Schedule 2; c) Pepco Interim Exhibit 1; d) Staff Exhibit 3, Schedule 2
10. a), b), c), d) Line 8 + Line 9

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 5429

April 15, 1970

IN THE MATTER OF	)	
	)	
Application of POTOMAC ELECTRIC	)	
POWER COMPANY for an increase in	)	Formal Case No. 541
rates for retail electric service.	)	

FINDINGS, OPINION AND ORDER

APPEARANCES: George F. Donnella, C. Belden White, II, Assistant Corporation Counsel, and Thomas J. O'Reilly, agent, for the Public Service Commission of the District of Columbia; Cornelius Means, Richard W. Emory, and W. John Kenney for Potomac Electric Power Company; Samuel S. Hollingsworth, C. Oscar Berry and Henry J. Krautwurst for Washington Gas Light Company; Leonard M. Shinn, Marvin H. Morse, Maurice J. Street, and Alan Goldberg for the Administrator of General Services, Acting on behalf of the Executive Agencies of the United States Government; Marsha Quintana and Glenn R. Carr for D. C. City-Wide Consumer Council; Anne Turpeau, Brin Hawkins, Timothy L. Jenkins, and Richard J. Hopkins for the Urban League; Jerry K. Emrich and Charles E. Hammond for Arlington County Board; Donald E. Leiter for Capitol Group Ministry, Inc.; Theressa H. Clark and James Williams for United Planning Organization; Stanley Sitnick, Jerome Akman, and Kelly C. Kammerer for Consumer Council, CHANGE, Inc.; David Blanken on his own behalf as customer and stockholder of Pepco; W. Frank Stickle, Jr., for Safeway Stores, Inc.

PROCEDURAL HISTORY

On February 27, 1969, the Potomac Electric Power Company ("Company" or "Pepco") filed an application for the purpose of obtaining a Commission determination of (1) the fair rate of return on the Company's depreciated original cost rate base; (2) the overall revenue required to produce such a return; and (3) the rate levels required to produce the approved revenue requirement. No testimony or exhibits were filed in support of the application at the time it was filed.

On April 24, 1969, notice was issued stating that a hearing or hearings on the Company's application would be held at a time and

place to be designated by the Commission and any person desiring to make representation on the application should do so in writing prior to May 16, 1969.

On May 15, 1969, the Company filed an amended application asking that the authorized rate of return be increased to not less than 7.50% and stated that to realize such an increase on the basis of 1968 sales and year-end, depreciated, original cost rate base, would require approximately 15.3% increase in annual revenues, which would amount to an increase of about $24,900,000 in retail rate schedule revenues, with a resulting increase in income to the Company, after taxes, of $11,100,000. The Company did file testimony and exhibits in support of its amended application on May 15, thus making it possible, as of that date, for the proceeding to move forward.

On June 5, 1969, we amended the prior notice by extending to the close of business on Monday, June 16, 1969, the date for any person to make representation to the Commission on the amended application.

Meanwhile, we moved forward to explore the Company's request that we hold joint hearings with the Maryland Public Service Commission, with whom an identical application had been filed. We initiated discussions to explore this possibility, but in mid-July, the Maryland Commission informed us that it wished to conduct separate hearings. Thereupon, we undertook to schedule our own hearings on the application. Accordingly, notice was issued on August 4, 1969, of a pre-hearing conference to be held on August 27, 1969, and for the commencement of the hearing on September 15, 1969.

On August 5, 1969, the Company filed with the Commission a supplementary document denominated "Emergency Application for Interim Rates". Similar filings were made in Virginia and Maryland. This, in effect, would have added an additional 6 - 1/2% to the basic charge for electrical service, amounting to $5,265,165, within the District of Columbia.

By notice dated August 11, 1969, the Emergency Application was consolidated with the basic application in Formal Case No. 541 for purposes of the pre-hearing conference.

Following the pre-hearing conference, hearings on the Emergency Application were held on September 10 and 15, culminating in Commission Interim Order No. 5402 of October 27, 1969, in which we ordered that

"the Emergency Application for Interim Relief, filed by Potomac Electric Power Company on August 5, 1969, be, and it is hereby, held sub judice until further order of the Commission."

Hearings on the Company's initial application, as amended, were held on September 25, 26; October 15, 16, 17; November 6, 7; December 15, 17, 18, 19. The Company and intervenors filed briefs on January 13 and 14, and oral argument was had on January 28, 1970. The transcript of these hearings constituted 2029 pages. We heard testimony from nineteen witnesses and received in evidence a total of 34 exhibits from the Company, General Services Administration, the Commission staff and from other intervenors. The intervenors were as follows: Washington Gas Light Company, D. C. City-Wide Consumer Council; General Services Administration; The Urban League; Arlington County Board; Capitol Group Ministry, Inc.; United Planning Organization; Consumer Council, CHANGE, Inc.; David Blanken, pro se; and Safeway Stores, Inc. A special session, held during the evening hours, was conducted on December 17, 1969, to provide an opportunity for interested members of the public, not parties to the proceeding, to present us with their views on the issues.

At the conclusion of the hearings on Phase I, Pepco renewed its Emergency Application, seeking interim rate changes on an expedited basis. By Order No. 5419, dated January 30, 1970, this Commission, after detailing its findings and conclusions, authorized the Company to add to all bills for electric service furnished by it to customers in the District of Columbia on and after February 2, 1970, and until further order of the Commission, a surcharge in the amount of 5% of such bills.

There has been discussion on the record of the time taken to complete these proceedings. We believe that we must regard the starting date as May 15, 1969, since it was not until that time that the Company filed its testimony and exhibits, thus making it possible to go forward with the case. There was then perhaps an unfortunate delay until late August in starting the hearings, caused first by our efforts to explore the Company's request for joint hearings with Maryland and subsequently by availability of staff in view of other commitments. However, the hearings, once started were conducted with dispatch. By late January, 1970, only eight months after the effective starting date, we granted the Company a significant measure of rate relief, having first provided full hearings on the issues. We think, in view of the complexity of the issues, the lengthy record, and the number of formal parties, that this proceeding was not unduly protracted.

STRUCTURE OF THE OPINION

Since this opinion is somewhat lengthy, it would perhaps be helpful to outline its general structure at the outset. The opinion reflects the analytical approach which we have applied in this proceeding -- the analytical approach generally taken in utility rate proceedings. Thus, we have determined the Company's operating results during a test period. We have determined both its average and its end-of-period rate base during the same test period. We have decided whether to use average or end-of-period rate base in determining future revenue requirements. We have then considered what the rate of return should be. In addition, we have considered certain other issues raised by the parties. These include (1) the propriety of the Company's contractual arrangements with the Pennsylvania-New Jersey-Maryland (PJM) interconnection; (2) the significance of the customers' ability to pay the rates set; (3) the jurisdictional allocation of plant and expenses; (4) the impact of Pepco's earnings levels in the years since the last rate case; and (5) the adequacy of the Company's fair employment practices. All of these topics are discussed in the order just set forth. We turn, therefore, to the test year results.

THE TEST PERIOD TO BE USED

The first question to be determined is which test period to use. In its original presentation, the Company presented actual figures for the calendar year 1968 and estimated figures for the calendar year 1969. The estimates were not prepared purely for the rate case. Rather, they were estimates made in the normal course of business by Pepco for budgeting and planning purposes. Over objection by GSA, we admitted both the 1968 actual figures and the 1969 estimates. We said at the time that we would leave open the question of the effect to be given to the estimated figures.

In the presentation of its case, the staff used a test year consisting of the twelve months ended June 30, 1969.

Late in the proceedings, after its own direct case had been fully presented and the cases of the other parties had been prepared and distributed, the Company offered revised exhibits which presented actual figures for the twelve months ending October 31, 1969, and asked that this period be considered the test year. We admitted the figures, but only for the limited purpose of determining the validity of the 1969 estimated figures which the Company had presented as part of its original

case. We ruled at that time, and we affirm that ruling here, that the Company could not base its case on an entirely new test year which neither the staff nor the other parties had had an opportunity to examine.

This, then, lays out the alternatives available to the Commission. We have the 1968 figures; the twelve months ended June 30, 1969; and the Company's estimated figures for the year 1969. The question of which to use is an important one because the 1969 estimate, the validity of which is essentially confirmed by the actual figures through October 1969, shows that the Company's rate of return, and its return on common equity were deteriorating as compared with 1968.

We reject, first, the use of the calendar year 1968 as the test period. We should use the most recent figures reasonably available for use during the hearings. The 1968 figures are, at this point well into 1970, greatly outdated. Moreover, there are, in fact, more recent figures available in the record.

We also reject the use of the estimated figures for the year 1969, as presented by the Company in its original presentation. We feel that the test period figures should be actual, rather than estimated, amounts. Only by using actual figures can the operating results be subject to thorough audit by our own staff and others. Unless we can be thus assured of the validity of the test year figures, we would be basing our decision on shifting sands.

We are left, therefore, with a test period of the twelve months ended June 30, 1969. These figures were presented to us by the staff. They are the most current figures which have been presented on the record with ample opportunity for study and cross-examination by all parties. They should, therefore, be used as the test year figures.

We will not be unmindful, however, of the deteriorating financial situation depicted by the 1969 calendar year estimate which was presented by the Company and which was largely confirmed by the actual figures for the first ten months of that year. In resolving questions involving average vs. year-end rate base, and in exercising our judgment as to the proper level of return, we have borne in mind the trends revealed by the 1969 estimates.

OPERATING RESULTS DURING THE TEST PERIOD

The Company's books, as kept in the regular course of business, reveal a net operating income for the test period ended June 30, 1969, of $51,027,129. The following table summarizes the operating results for that period.

Table I

Operating Revenues		
Sales of electricity	$175,185,750	
Other operating revenues	1,416,102	
Total Operating Revenues		$176,601,852
Operating Revenue Deductions		
Operating expenses	75,767,729	
Depreciation	23,613,678	
Taxes other than income taxes	18,692,432	
Income taxes	7,500,884	
Total Revenue Deductions		125,574,723
Net Operating Income		$ 51,027,129

The staff conducts a continuing audit of the Company's books through its resident auditor at the Company's offices. In addition, a special and thorough audit was made of the figures for the test period in connection with the staff's preparation for this case. There were no disputes as to the Company's revenue figures and the only disputed item of expense involves the investment tax credit.

The staff and the Company each made an adjustment to expenses involving this credit. Each adjustment reflected the averaging effect of the investment tax credit. However, the Company and the staff had varying interpretations of the Commission's language in the 1966 Pepco rate order, Order No. 5062, Re Potomac Electric Power Co., 64 PUR 3rd 364. For the test year ended June 30, 1969, the staff's adjustment, following its theory of averaging, served to reduce net operating income by $871,167. If the Company's theory were adopted, the adjustment in that period would be $1,093,000.

Order No. 5429, page 7.

In order to resolve the differences in interpretation placed upon the Commission's action in Formal Case No. 511, it is necessary to review the language of the Commission Order in that case. In Order No. 5062, supra, at p. 373 we said:

> "...[A]veraging is merely a well-known and necessary mathematical adjustment of an item affecting income which fluctuates from year to year. It is generally referred to as 'normalizing.' The reason for normalizing income items which vary in amount from year to year should be obvious. If normalizing were not done in such instances, an injustice might be done either the Company or the public, depending on which way the amount of the current year's recording varied from an average amount."

At that time, the investment tax credit was a new part of the tax law. As a result, we used all 3 1/2 years available for the purpose of developing the average amount. This is the nub of the disagreement between the staff and the Company. The Company would continue to use all prior years since institution of the credit in developing the average investment tax credit. The staff would use only the past five years.

Mr. Davis, a Company witness, testified that in choosing all the years for developing the average he was following the language of Order No. 5062. The staff rejected the Company method. It contended that if continued into the future without change in the underlying theory of averaging, the method would defer the flow-through of the investment tax credit to such an extent that the Company would in effect have the benefit of the service life flow-through method which the Commission had specifically rejected in Formal Case No. 511. The staff then reviewed the annual investment tax credit booked by the Company for each of the years going back to the year 1962 and determined that there has been an increase in investment tax credit in the past several years to a new and higher level as the Company has embarked upon new and larger construction programs. As a result, the staff considered the most recent five years to be a representative period for developing an average in order to eliminate the fluctuation in investment tax credits. We accept this conclusion of the staff and will use the average of the five years ended June 30, 1969, as the basis for adjusting investment tax credit.

Order No. 5429, page 8.

With this adjustment, the net operating income for the test period year June 30, 1969 is as follows:

Net Operating Income Per Books (See Table I, supra, p. 6)	$51,027,129
Adjustment for Average I.T.C.	(871,167)
Net Operating Income as Adjusted	$50,155,962

THE RATE BASE

Having determined Pepco's operating results for the test period, we turn to a consideration of the rate base to which those operating results should be applied.

As in past cases, we will apply the net investment theory in determining the rate base. We will determine, in other words, the book cost of plant and facilities, add to it materials and supplies and an allowance for working capital, and deduct therefrom the depreciation reserve, contributions in aid of construction, and customers' advances for construction.

As with operating results, we were presented with rate base figures for a number of test periods: (1) calendar year 1968; (2) calendar year 1969 estimated; and (3) 12 months ended June 30, 1969. Since we have determined to use the June 30, 1969, test period (see p. 5 supra,) we will turn to those figures.

The end-of-period rate base and the average or weighted rate base for the test year June 30, 1969, were placed in evidence by the staff. They are set forth in detail below.

Order No. 5429, page 9.

Table II

		Weighted	End-of-Period
1.	Electric plant in service	$ 877,903,407	$ 895,889,261
2.	Construction work in progress	72,097,760	117,987,617
3.	Electric plant held for future use	1,815,001	2,618,516
4.	Total Electric Plant	951,816,168	1,016,495,394
5.	Reserve for depreciation - electric plant	(180,130,452)	(188,264,786)
6.	Net Electric Plant	771,685,716	828,230,608
7.	Materials and supplies	25,696,141	22,943,181
8.	Allowance for cash working capital	11,783,860	12,842,000
9.	Net Plant plus Working Capital	809,165,717	864,015,789
10.	Contributions in aid of construction	(9,194,021)	(9,668,580)
11.	Customers advances for construction	(5,819)	(5,819)
12.	Net Rate Base	$799,965,877	$ 854,341,390

The data presented is taken or calculated directly from the books and records of the Potomac Electric Power Company with one exception, that of the allowance for cash working capital. The figures include those items of investment used by Pepco in providing electric service for the public.

Again, neither the staff's thorough review nor the questions raised by intervenors involve any dispute as to items which should be included in the rate base. Only one item -- the allowance for cash working capital -- requires any discussion.

As we discussed in our 1966 Pepco rate order, supra, 64 PUR 3rd at 376, an allowance for working capital is only required if the revenues received from ratepayers are not received in time to meet current expenses. To determine whether such a condition exists, and

the amount of cash working capital needed if it does, a lag study should be employed. The Company has prepared such a study and the staff has given it close review. The exhibit, as offered by the Company, indicates that there is a lag in collection of revenues of 51.71 days, while the lag in payment of expenses is 14.76 days. As a result, an allowance for working capital is needed to cover the 36.95 day net lag in collection of revenues from customers for payment of expenses. Using these data, the staff computed the weighted and unweighted working capital requirements of the Company for the test year. As indicated in Table II, above, the amounts computed are, respectively, $11,783,860 and $12,842,000. The staff's computations were prepared on the same basis as the study accepted by the Commission in Re Potomac Electric Power Co., supra, 64 PUR 3rd at 376-77. For the reasons discussed there, we accept the present study.

Average (Weighted) or End-of-Period (Unweighted)

It will be noted that we have set out figures for both the weighted and end-of-period rate base. While, as just noted, there was little, if any, dispute as to the figures for each approach, a major issue to be resolved is which of these two rate base calculations we should use.

This question is not one of first impression. Pepco cites, for example, our decisions in its 1955 and 1959 rate cases, Order No. 4182, 8 PUR 3rd 76; Order No. 4525, 28 PUR 3rd 206; our 1958 decision in Washington Gas Light Company, Order No. 4468, 24 PUR 3rd 417 and our 1964 decision in The Chesapeake and Potomac Telephone Company, Order No. 4887, 57 PUR 3rd 1, all holding that use of an end-of-period rate base for rate-making purposes was appropriate. Pepco would distinguish our 1966 decision, Order No. 5062, 64 PUR 3rd 364, prescribing use of an average rate base for Pepco on the ground that we there concluded that attrition did not exist.

In this case, Pepco contends, the existence of attrition is clearly demonstrated by the testimony and exhibits of Mr. Charles Carr, its vice-president and comptroller. Mr. Carr testified that since June 30, 1965, Pepco's weighted rate base has increased by a greater percentage than its operating income, and that its operating ratio has shown a marked increase since 1967. These two factors are labelled by Mr. Carr

as the tests for attrition used by the Commission in our 1966 Pepco decision. Mr. Carr also pointed to a decline in income available for equity in both dollars and as a percent of weighted rate base, an increase in total cost ratio, and a decline in operating income as a percent of weighted rate base as additional indicia of the existence of attrition.

Pepco advanced, as its primary reason for using an end-of-period rate base, that rates fixed for the future should be based more nearly upon the property and plant to be devoted to public service at the time such rates go into effect. Pepco also contends that use of an average or weighted rate base for a past period would be unreasonable and capricious, particularly when that rate base would be less than the weighted rate base for the next succeeding period, since such use would operate to deny Pepco any return on the additional investment represented by the difference between the historical weighted rate base and that forecast for the end of the historical period. The end-of-period figure, according to Pepco, will be less than the weighted figure for the future period in which new rates can be expected to go into effect, and thus Pepco must inevitably litigate a Commission decision to use a weighted rate base or immediately file a new rate increase application.

In addition to Pepco, only the Commission staff and Arlington County presented testimony on this rate base issue. For Arlington County, Mr. Charles E. Hammond, Executive Director of the Arlington County Public Utilities Commission, urged that we use a weighted rate base in determining Pepco's revenue requirements and rates, pointing out that in his opinion, customers should be required to pay rates covering only the present cost of serving them, including a return on plant in service and plant under construction.

The Commission's Chief Accountant, Paul D. Kagen, also recommended that the Commission use a weighted or average rate base. Essentially, Mr. Kagen's rationale involved three points: (1) attrition does not exist; (2) use of an end-of-period rate base and earnings for that period distorts operating results; and (3) use of an average rate base produces future rate of return results more closely approximating the rate of return allowed by the Commission.

With respect to the existence or non-existence of attrition, which in past decisions we have held to be a primary consideration in rate base determinations, Mr. Kagen suggests that the relationship between growth in plant in service and growth in operating income should be deter-

minative, rather than growth in total rate base and operating income. He pointed out that other major elements of total rate base, e.g., plant under construction and cash working capital, are either non-income producing or are subject to fluctuation for reasons having no relationship to attrition, such as a speed-up in Federal tax collections. Mr. Kagen's use of growth in plant in service was based in part, he testified, on our finding in the last Pepco rate case before us, 64 PUR 3rd 364, 382, that attrition was not present because, inter alia, the growth relationships there compared were distorted by the inclusion in total rate base of substantial amounts invested in Pepco's Chalk Point station which was not then revenue producing. In Mr. Kagen's view, since attrition has been described as a phenomenon involving increasing plant costs, constant rates, and a resulting decline in rate of return, the existence or non-existence of the phenomenon can accurately and properly be determined only if revenue trends are compared with revenue producing plant.

As an additional test for attrition, Mr. Kagen presented statistical data and calculations showing that on a unit cost basis (per 1000 KWH sold), Pepco's investment was lower in 1969 than in prior years, and that while its earnings per 1000 KWH sold were also lower, the percentage decline in investment was greater than that in earnings. On a unit basis, therefore, it appeared to Mr. Kagen that new Pepco investment produced higher, rather than lower earnings, and he concluded therefore that attrition was not present in this case.

As his second reason for urging use of an average rate base, Mr. Kagen noted that Pepco revenues during the test period should be attributed to the rate base in existence during the period, not the rate base existing at the end of the period. To relate such revenues to an end-of-period base, according to Mr. Kagen, in effect requires the patently false assumption that that base was in service throughout the period. Since this is not true, operating results are distorted and the Commission would not have an accurate appraisal of Pepco's operations.

Mr. Kagen's third reason for using an average rate base, i.e., that it would produce rates of return in future years more nearly in line with that approved by the Commission in this case, was based on his analysis of Pepco earnings in years subsequent to its last three rate cases before this Commission. His figures show that since the last Pepco case, in which we used an average rate base, Pepco's rates of return in subsequent years have been within .4% of the rate of return authorized.

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A similar study of rates of return earned by Pepco in years following cases in which we approved use of an end-of-period rate base showed a substantially greater positive variation from the rate of return authorized in those cases.

Mr. Kagen's position on this issue was strongly supported by GSA on brief. Speaking for the Government as a ratepayer, it is GSA's contention that relating earnings over a period to investment at the end of the period is incorrect, illogical, and inequitable, particularly in periods of heightened construction activity, since ratepayers are in effect asked to provide a full return for a full year on plant investment in existence for only part of that year. GSA urges that the appropriateness of use of an average rate base is well established in decisions of this Commission and other regulatory bodies, and that no reason exists for departing from these precedents in this case.

We have reviewed our statement in the 1966 Pepco case of the general principles applicable to determining whether to use average or end-of-period rate base in determining both historical operating results and future revenue requirements. We reaffirm that statement of principles here. The average (i.e., weighted) rate base clearly should be used in gauging a company's performance during a historical period. Similarly, the average rate base should be used in determining future revenue requirements unless there is specific evidence in the record which shows the existence of attrition in the company's earnings due to the effects of inflation. If there is a showing of such attrition, the use of this end-of-period rate base is justified in setting future revenue requirements.

In past cases we have at times found evidence of attrition and have used the end-of-period rate base. This was done in the 1955 and 1959 Pepco rate proceedings, (8 PUR 3rd 76; 28 PUR 3rd 206); in the 1958 Washington Gas Light proceeding, 24 PUR 3rd 417, and in the 1964 Chesapeake and Potomac Telephone Company case, 57 PUR 3rd 1. On the other hand, in the 1966 Pepco case, we found no convincing evidence of attrition and adhered to the normal approach of using the average rate base, 64 PUR 3rd 364.

We have carefully weighed the evidence and the arguments concerning that evidence. We have concluded that this record does support the conclusion that attrition exists and, accordingly, that an end-of-period rate base should be used in determining the Company's future revenue requirement.

In the 1966 Pepco decision, we indicated various factors which would indicate the existence of attrition. We said that attrition "involves the question whether the increase in plant cost [due to inflation] will outstrip the increase in net operating income [due to addition of new plant], thus leading to a decline in the rate of return." Re Potomac Electric Power Company, supra, 64 PUR 3rd at 381. There is no question here that Pepco has been faced throughout 1969 with a declining rate of return. On its 1968 average rate base, it earned 6.45%; for the twelve months ended June 30, 1969, it earned 6.27%; for the twelve months ended December 31, 1969, its estimated return was 6.14%. The only question is whether the decline can be attributed to the factors which we characterized in our past rate decisions as attrition.

Applying some of the tests utilized in our 1966 decision, it would indeed appear that the decline in rate of return is attrition-related. Thus, we referred in our 1966 decision to a comparison of the growth in weighted rate base with growth in net operating income. The record here shows that the weighted rate base at June 30, 1969 had grown 39.42% from its level at June 30, 1965, while net operating income in the same period had grown 36.23%. Moreover, the 1969 estimated result, the validity of which was confirmed by the actual figures for the first ten months of the year, showed that this trend as between growth in rate base and growth in net operating income was continuing and, indeed, accentuating. According to the estimate, the growth in weighted rate base from June 30, 1965 to December 31, 1969 was 49.73% while net operating income grew 43.39%.

In 1966, we also examined the Company's operating ratio. We found that it was declining. In other words, the percentage of revenues left over after meeting operating expenses was increasing. Company counsel made it clear in that proceeding that that trend was expected to continue. Here, the evidence shows that the Company's operating ratio has been increasing throughout 1968 and 1969, thus reducing the percentage of revenues remaining after meeting operating expenses. For the calendar year 1967, the operating ratio was 39.23. For the twelve months ended June 30, 1969, it was 42.90. For the calendar year 1969, it was estimated to be 43.10.

In short, this record demonstrates a declining rate of return, a deterioration in the growth rate of rate base as compared with the growth rate in net operating income, and an increasing operating ratio. These were all factors which we have previously held to be indicia of attrition.

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We have considered the staff's analysis of the problem and have concluded that we cannot accept it. They responded to the adverse trend in growth of rate base vis-a-vis growth in income by excluding from consideration the item of construction work in progress. On this basis, the growth rate in plant compares favorably with the growth rate in income. However, this record makes it very clear that the rate base will include very substantial items for construction work in progress for the next several years and we feel that we must take into account the trends which recognize this item of plant. When work in progress is included, the comparison between plant growth and revenue growth is not a favorable one. The staff was also concerned with the distorting effect of using revenue figures for a year with rate base figures as of the end of that year. We share their concern. However, we think this distorting effect is of more importance in gauging the results of a historical period. In that task, as we have previously indicated, the weighted rate base should always be used. Here, however, we are concerned with future revenue requirements. If attrition does exist, then the distortion with which the staff is concerned is secondary to taking into account the effects of that attrition.

In the final analysis, our concern must be that the Company has a real opportunity to earn the rate of return we find to be reasonable in the period after rates are adjusted. This is particularly important at this juncture for Pepco. The Company's financial situation has suffered during the period while this rate case has been in progress.1/ The Company has a very real need for an improvement in its equity earnings if it is to be able to carry out the financing required by its construction program. We must be sure that it actually receives the measure of assistance we seek to give it. We believe that if we base our determination of revenue requirement on the weighted rate base for the June 30, 1969 test period, the adverse trends we have been discussing will have the effect of reducing the actual return experienced in the period following our order to levels below that which we deem reasonable. To avoid that result, since its cause can be laid to attrition, we will, in this instance, depart from the normal rate-making practice of using a weighted rate base. For purposes of determining the Company's future revenue requirements, we will use the end-of-period rate base for the twelve months ended June 30, 1969.

1/ We should make it clear that we are not saying that there is a causal relationship between their financial plight and the rate case. We believe this case has been handled reasonably and expeditiously, giving consideration to the rights of all concerned. The cause lies in the Company's decision as to the timing of its request.

RATE OF RETURN

Having determined Pepco's operating results for the test period, and having settled upon the use of an end-of-period rate base for determining future revenue requirements, we can now turn to the next major element in our analysis -- the determination of a fair rate of return.

We heard testimony on this subject from witnesses called by the Company, by the staff, and by GSA. We will start with a description of each witnesses' presentation.

Dr. Morton's Testimony

Testifying for Pepco, Dr. Walter A. Morton recommended a fair rate of return of between 7.6% and 7.9% on an original cost net investment rate base. Dr. Morton, who received his doctorate in economics from the University of Wisconsin, is a veteran rate of return witness, having appeared before many state regulatory bodies and at least five Federal commissions over a period of many years. His appearance in this proceeding marks the third time that Dr. Morton has testified before this Commission in the last four years.

As he did in the last Pepco rate case, Formal Case No. 511, Dr. Morton espoused comparative earnings, capital attraction, and financial integrity with sound credit as tests of a fair rate of return, tests which he viewed as the economic and legal standards stated in the Bluefield and Hope cases.2/ For a rate of return to be "fair", according to Dr. Morton, it must satisfy all three tests.

Dr. Morton also noted that the value of money and the cost of money factors which determine the fair rate of return have trended in opposite directions in recent years. While inflation has caused the value of money to decline, the cost of money, which he considered the most important single element of a fair rate of return at this time, is at an all-time high. These factors, together with a general deterioration in the attractiveness of utility common stocks and the "huge" capital requirements of Pepco during the next few years, make Pepco's need for higher earnings "imperative", said Dr. Morton.

2/ Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, 692, 693, PUR1923D 11, 67 L ed 1176 43 S Ct 675; Federal Power Commission v Hope Nat. Gas Co. (1944) 320 US 591, 603, 51 PUR NS 193, 88 L ed 333, 64 S Ct 281.

He pointed out that since the cost of capital is composed of pure interest plus risk, higher interest rates affect both debt and equity portions of total capitalization and therefore tend to raise the overall fair rate of return.

In approaching his determination of a fair rate of return for Pepco, Dr. Morton addressed first the cost of debt, the cost of preferred stock, and the capital structure of Pepco. Having determined that the average capitalization for the past 22 year period as recorded in Pepco's books was 56% debt, 8% preferred, and 36% common stock equity, Dr. Morton then adjusted the structure. He accepted an adjustment prepared by Witness Carr which reflected convertible securities as common stock equity, thereby arriving at a 58% debt ratio and a 6% preferred stock ratio as of December 31, 1968. He calculated an embedded cost of debt of 5%, and an embedded cost of preferred stock of 5.8%. He concluded that a fair rate of return on the equity of Pepco is in the area of 12% to 13%. Application of these figures to capital structure produced the fair rate of return of 7.6% to 7.9%.

The bulk of Dr. Morton's direct testimony, and almost all of his testimony on cross-examination, was devoted to his conclusion that 12% to 13% was a fair return on Pepco's equity capital. In this proceeding, as in the 1965 Pepco case, Dr. Morton placed primary emphasis on comparative earnings. Using "opportunity cost" as the economic expression of the legal "comparative earnings" test, Dr. Morton stated as the general economic principle that an investor will expect in any given investment the same opportunity for earnings or dividend growth as he might obtain from some other source, allowing for his estimate of risks and hazards.

Dr. Morton agreed that investors in fact do evaluate differences in risks, and that their judgments of comparative risks and prospects of different stocks are reflected in the market prices of the stocks. In his view, however, use for regulatory purposes of earnings-price or dividend-price ratios, or a formula such as the discounted cash flow (DCF) method, is inherently fallacious when applied to a net investment rate base, particularly when market value is substantially in excess of book. Since these formulas are essentially derived from market prices, application of the rate of return derived from their use to a smaller book value rate base results, according to Dr. Morton, in earnings lower than the postulated expectations of the investor.

To avoid this result, and to determine investor earnings expectations and evaluations of relative risks, Dr. Morton calculated Pepco's market-book ratios for the period 1947-1968. By comparing these ratios to market-book ratios for Moody's 125 industrials, 26 electric utilities, for a sample of FPC class A and B electrics, and for Moody's 24 utilities, he concluded that investors were placing a lower value on Pepco's stock than on other stocks. He attributed this evaluation primarily to the fact that Pepco's earnings did not match up with earnings of the other groups. Dr. Morton's comparison of market-book ratios and growth rates in market price, earnings, and dividends per share for Pepco and the industrial and utility groups showed Pepco to be lagging behind, and its relative market-book ratio deteriorating. Dr. Morton concluded that improvement in Pepco's earnings was necessary in order to provide it with a fair rate of return. He then used two methods (linear and curvilinear) to calculate how much the current earnings on book equity of Pepco (10.5%) would have to be raised to bring Pepco's market-book ratio to a parity with the other groups in view of the market's estimate of their relative risks, and thus satisfy his "opportunity cost" test.

Dr. Morton's curvilinear relation, to which he gave greater weight, was made on the basis that a 2/3% rise in earnings would increase market price by 1%, with this result being attributable to a compound interest effect. His curvilinear analysis, according to Dr. Morton, indicated that in order to achieve parity between Pepco's market-book ratio and those of his comparison groups for the period 1964-1968, which Dr. Morton considered most pertinent, Pepco's earnings on equity would have to be increased to 12.0% to 14.7%. Using this analysis as a method of risk measurement, considering it as information along with other data on earnings, dividends and growth of other common stocks, investment opportunities available in bonds and other investments, and supplementing these data by judgment, Dr. Morton concluded that the cost of equity capital for Pepco in this proceeding would be between 12 and 13%.

Drs. Thatcher's and Thompson's Testimony

Testifying on rate of return for the Commission's staff were Dr. Lionel W. Thatcher who, like Mr. MacIntosh and Dr. Morton, is an expert of many years' experience in the rate of return area, and Dr. Howard E. Thompson, an associate of Dr. Thatcher on the faculty of the University of Wisconsin and Chairman of the Department of Quantitative Analysis in the Graduate School of Business at Wisconsin.

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Dr. Thompson provided the Commission with direct testimony and exhibits involving the development and use of mathematical growth equations and models for measuring the cost of equity capital in determining the overall rate of return. Dr. Thatcher developed a cost of long-term debt; utilized two additional methods of arriving at a cost of equity capital; and, in joint undertaking with Dr. Thompson, combined the results of their studies and presented a final recommendation on the overall fair rate of return to Pepco.

Dr. Thatcher approached the question of rate of return on a cost of service basis, stating that a utility may charge rates to meet all above-the-line expenses as well as the costs of capital. Like Dr. Morton and Mr. MacIntosh, Drs. Thatcher and Thompson agreed on the basic tests of a fair rate of return for a public utility as set forth in the Bluefield and Hope cases, supra, p. 16 . Although Dr. Thompson recognized the so-called "comparable earnings" approach to determining the cost of equity capital, there were, in his opinion, several basic flaws in this method, including the difficulties associated with the measurement of comparable risks, a lack of recognition of the importance of market price, an inconsistent relationship between book value and market value as between industrials and utilities, and a tendency in using the comparable earnings method to rely on average earnings or a central tendency of various groups of industrial companies.

Dr. Thatcher employed a conventional cost of capital approach, using actual or embedded costs for the outstanding debt. He also estimated the current cost for new debt capital to be issued by Pepco in the future. Similarly, he computed the embedded costs of outstanding preferred stock and estimated the current cost of future preferred stock issues. On the basis of his studies, Dr. Thatcher concluded that the embedded cost of debt for Pepco as of June 30, 1969, including short-term bank loans, was 5.14% and estimated the current cost of new debt capital to be approximately 8.5%. This estimate was based on a study of the recent history of interest rates and bond costs of electric companies, and a compilation of the average yield on the four top grades of Moody's public utility bonds.

The cost of Pepco's outstanding preferred stock was determined by Dr. Thatcher to be approximately 5.6%. This figure represented the average embedded cost of the five issues of preferred stock of Pepco. Using Moody's indices for high and medium grade

public utility preferred stocks for the years 1948 to 1968, and for the months available during the year 1969, Dr. Thatcher concluded that the current cost of a new issue of preferred stock would be approximately 8.5%.

In determining the cost of equity capital, Drs. Thatcher and Thompson, as noted above, employed three methods, each designed to furnish a basis for determining a proper rate of return on the equity portion of Pepco's capital structure. Dr. Thatcher presented statistical data reflecting earnings-price ratios and dividend yields for Pepco and other electric utilities, schedules showing trends in consumer prices and gross national product figures, and other financial data. He then applied his first technique for determining common earnings requirements, a calculation of the sum of the dividend yield on the common stock and the percentage increase in the book value per share of the stock. As Dr. Thatcher explained, the economic rationale of this technique is that over time the percent increase in market value of a share should correspond with the increase in book value and the increase in dividends per share. Applying this technique to Pepco data for the 1949-1968 period, Dr. Thatcher developed measurements of the average Pepco investor's income ranging from a low of 8.7% to a high of 9.7%, with the average for all periods studied being 9.3%.

The second technique utilized by Dr. Thatcher, also based on the same economic rationale, involved a calculation of the percent growth in earnings per share plus average dividend yields. His calculations demonstrated that for Pepco the total growth rates of earnings plus dividend yields range from a low of 8.8% to a high of 10.9%, with the average total investor's income using this method being 9.8%.

Dr. Thompson's approach to a determination of the cost of equity capital, as noted above, involved the use of complex mathematical growth equations and models. The initial step in Dr. Thompson's formula was a determination from market statistics of Pepco dividend yield and an estimate, based on Pepco data, of the growth rate of dividends. The sum of these two figures was what Dr. Thompson termed an "investor capitalization rate." In developing the required rate of return on equity, however, Dr. Thompson stated that the investor capitalization rate is only one factor. Other factors, including the rate of growth of net assets, the dividend payout ratio, the ratio of net proceeds on new

stock issues to market price, and the market price to book value ratio were considered by Dr. Thompson to be important in development of the required rate of return on equity capital, and were used by him in reaching his conclusions. Dr. Thompson's calculations, which he agreed were "somewhat complicated," essentially consisted of a determination of a rate of growth of equity capital or net assets, an investor capitalization rate, a dividend-payout ratio, and a net proceeds-to-market price ratio, all of which Dr. Thompson stated can be determined objectively from market and Company data. These factors were then expressed in a growth relationship equation and a market-to-book relationship equation, which he then simultaneously solved to produce the rate of growth shares and the required rate of return for any selected market-to-book ratio. It was Dr. Thompson's view that the market-to-book ratio should be set sufficiently high so that in the event of an adverse change in the investor capitalization rate, the market price of a stock would not fall below book value plus an amount (10%) for flotation costs.

Dr. Thompson's calculations, using the two extremes of the investor capitalization rates arrived at in his study and that of Dr. Thatcher (9.3% and 10.4%) and using assumed growth rates of 8% and 9% found that the rate of return required on Pepco equity capital would be between 11.1% and 12.3%. Using these equity capital rates of return, associating them with Dr. Thatcher's calculations of the cost of debt and preferred stock capital, and applying these figures to Pepco's capital structure as of June 30, 1969, Drs. Thatcher and Thompson arrived at an overall recommended rate of return for Pepco of between 7.02% and 7.38%.

Mr. MacIntosh's Testimony

The only intervenor who offered testimony on the subject of rate of return was the Administrator of General Services (GSA), acting on behalf of the executive agencies of the United States Government as customers of Pepco. GSA offered the testimony of Mr. James K. MacIntosh, a widely recognized expert witness in the rate of return area, who has testified before various Federal and state commissions over a period of some 13 years.

Mr. MacIntosh concluded that a reasonable rate of return to Pepco at this time would be approximately 6.69%. Included in this figure was a .25% allowance which Mr. MacIntosh termed a safety factor to provide for unforeseen circumstances.

As did Dr. Morton, Mr. MacIntosh arrived at his overall rate of return recommendation by separately considering the cost of debt, preferred stock, and equity capital. Mr. MacIntosh found the embedded cost of debt capital to Pepco to be 5.251%. He estimated the cost of a new debt issue in the current market at approximately 8.5 to 8.7%. Pepco's effective cost of preferred stock outstanding, according to Mr. MacIntosh, is 5.610%, with any new issue of preferred stock estimated to cost approximately 7.5 to 8.0%. On a net proceeds basis, the cost to Pepco of its outstanding debt, debentures and preferred stock was determined by Mr. MacIntosh to be 5.309%.

Mr. MacIntosh approached the problem of determining the cost to Pepco of equity capital on the basis of the study and analysis of the "money markets." Initially, his study involved the determination of annual earnings-price ratios for Pepco common stock over a substantial number of years, an analysis of these ratios in comparison with annual earnings-price ratios for other utilities. Mr. MacIntosh then related the market price for a given year to the earnings realized in the third year following the selected year and calculated earnings-price ratios on that basis. By so doing, he testified, investors' future expectations are taken into account. A three-year period is selected, according to Mr. MacIntosh, on the basis of his judgment that this is as far ahead as the average informed investor could or would project earnings expectations with reasonable certainty.

Mr. MacIntosh's testimony and his exhibits reflect detailed studies of earnings of other regulated utilities, their earnings-price ratios, and the effect on the cost of equity capital of the pressure on market price of a new equity issue and corporate costs involved in issuing the stock. Taking all of these factors into consideration, together with the capital structure of Pepco, it was Mr. MacIntosh's conclusion that the return on equity capital required by Pepco to attract capital and to meet the Hope and Bluefield, supra, p. 22 , tests was 8.47%. Mathematical application of the separately determined costs of debt, preferred stock, and equity to Pepco's capital structure produced an overall rate of return figure of 6.44% to which, as noted above, Mr. MacIntosh added a safety factor of .25% thus producing as his recommended fair rate of return of 6.69%.

Conclusions on Rate of Return

The heart of this proceeding is the determination of the fair rate of return. On most of the other issues relating to revenues and cost of service, there is little, if any, controversy. On the subject of rate base, there was but one question of substance to be resolved, i.e., the choice of average or year-end figures. Thus, the

central and controlling decision at this juncture for Pepco is the determination of the rate of return which it should be allowed. We have summarized above the testimony presented to us on the subject. We have had the benefit of the views of four witnesses on the subject, all of whom are well-qualified to deal with the questions involved and all of whom are experienced in making rate of return analyses. We feel, therefore, that we have an adequate record on which to make a judgment as to the fair rate of return.

As indicated above, we have testimony from Mr. MacIntosh of GSA, suggesting a rate of return of 6.69%, based on the embedded cost of debt of 5.251%, and embedded cost of preferred stock of 5.610% and a cost of equity of 8.470%. In addition, we have testimony from Drs. Thatcher and Thompson, called by the staff, that the fair rate of return should fall in a range between 7.02% and 7.38%. They used an embedded cost of debt of 5.14% and an embedded cost of preferred stock of 5.6%. Their analysis of return on equity led them to the conclusion that the proper level lay in a range of 11.1% to 12.3%. Finally, the analysis of Dr. Morton, the Company witness, led him to the conclusion that a rate of return of 7.6 to 7.9% was justified. He used an embedded cost of debt of 5% and an embedded cost of preferred stock of 5.8%. It was his position that the cost of equity was between 12% and 13%.

Drs. Thatcher and Thompson, on the one hand, and Dr. Morton, on the other, have reached conclusions on rate of return which are within the same broad range. Mr. MacIntosh, on the other hand, has recommended a figure considerably below that range. Hence, we have, at the outset, considered the validity of Mr. MacIntosh's approach.

We have concluded that Mr. MacIntosh's recommendation is without merit and must be rejected. Before getting to an evaluation of his methodology, we note that the results he reaches therefrom appear anomalous. For instance, as noted above, Mr. MacIntosh concludes the cost to Pepco of equity capital is 8.47%. At the same time, he estimated that the current cost of debt for Pepco would be 8.50 to 8.70%. (This estimate proved low; a bond issue shortly after his testimony cost Pepco 8.93%.) Thus, by Mr. MacIntosh's own admission, he is asserting that equity capital would cost Pepco less than debt. This is contrary to every basic principle of financial analysis. Debt as the senior security, with first claim on the assets of a corporation, is inevitably a lower risk investment than

equity capital. That lower risk is universally reflected in a lower cost for debt than equity. Without belaboring the point, we might briefly refer to a few basic texts on the subject.3/

Moreover, Mr. MacIntosh's conclusion on cost of equity seems questionable when placed in its historical context. He was a witness in our 1955 Pepco rate case, Formal Case No. 438, and testified at that time that Pepco's cost of equity was 9.32%. Thus, he is now asserting that Pepco's cost of equity capital has declined in the past 15 years. It is difficult to accept the validity of such a claim in light of the inflationary history of that period.

Moreover, the Commission's determination in the 1966 Pepco rate case, Formal Case No. 511, was that Pepco's cost of equity was in the neighborhood of 10%. To accept Mr. MacIntosh's present recommendation we would have to be able to defend the proposition that the Company's equity capital has become lower in cost since our last rate case. We do not think that such a proposition is defensible. The period since 1966 has been one of significant inflation. Interest rates have reached levels not seen in many years. It is inconceivable in these economic conditions that the cost of equity for Pepco could have declined since 1966.

Finally, we note that if we set the Company's return at the level recommended by Mr. MacIntosh, the earnings per share would be at a levellower than that experienced by the Company during 1968. Yet Mr. MacIntosh himself testified that investors purchase common stock partially in reliance upon the expectation of increases in earnings. It would make no sense to set the return at a level which would permit no growth in those earnings.

We approach those results even more cautiously when we examine the methodology used by Mr. MacIntosh. His conclusions on the cost of equity were based on an analysis of earnings-price ratios. This is a well-recognized approach to analysis of the rate of return question which many commissions have utilized in past years. It may

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3/ Charles F. Phillips, Jr., The Economics of Regulation, p. 280, states: "The interest rate on debt is normally lower than the cost of equity capital."
Paul J. Garfield and Wallace F. Lovejoy, Public Utility Economics, p. 129.
Eli Winston Clemens, Economics and Public Utilities, p. 231.

well, in appropriate circumstances, provide a commission with useful information as to the market appraisal of a given stock by investors.

However, it does focus its primary attention on the investor's willingness to pay for current earnings, rather than anticipated growth in earnings, dividends, and market price. In an attempt to meet this problem, Mr. MacIntosh did compare the earnings per share for a given year to the price of those shares three years earlier. We believe that this is at best a crude tool for overcoming the problem at which it is aimed.

While not rejecting the use of earnings-price ratios as an appropriate analytical method in rate of return consideration, we believe we should take note of those commentators who have suggested caution with its use under present market conditions. Our caution in accepting the method as used by Mr. MacIntosh here is reinforced by our doubts as to the results he reached.

In other words, we note that Mr. MacIntosh's earnings-price ratio methodology, while a recognized analytical tool, is one which may have limitations under current conditions. When we couple this fact with our conclusion that the results he reached seem questionable, we are constrained to put aside his recommendation. We have concentrated, therefore, on the analysis provided us by Drs. Thatcher and Thompson, on the one hand, and Dr. Morton on the other.

We note first their agreement on certain basic principles. Both have testified that the basic legal test for rate of return determination is set out in FPC v. Hope Natural Gas Co., supra, p. 25 . They agree that the Hope case suggests three touchstones: (1) the maintenance of the credit and financial integrity of the enterprise; (2) the provision of earnings comparable to other enterprises of similar risks and hazards; and (3) the provision of earnings adequate to attract capital. There may be some disagreement as to whether, and to what extent, one of these tests has primacy, but, as we understand their testimony, there is agreement that a certain interrelationship and interdependence exists between the tests.

While these experts agree on these basic principles, they approach the application thereof by different methodologies and this creates some measure of conflict between them. One source of conflict involves the significance, for comparative purpose, of earnings of industrial firms. Dr. Morton places significant reliance on such figures. Dr. Thatcher, however, expresses serious reservations about

their use. He bases his concern on the variability in industrial earnings as compared with utility earnings; on the variability of book-to-market value ratios of industrials as compared to utilities; and on the dangers of using averages which cover a wide variation among the underlying figures. We accept most of Dr. Thatcher's reservations. We think that any analysis of return which relies significantly on industrial earnings must be approached cautiously. Earnings are comparable only to the extent that risk is comparable and the risk involved in utility companies is significantly different than that of utilities. The variability in earnings and market-to-book ratios which Dr. Thatcher points out is symptomatic of that differing degree of risk.4/ Hence, while we have given the most careful consideration to Dr. Morton's analysis, and have found it to be of assistance in forming our own judgment, we have refrained from placing ultimate reliance upon it.

We might comment briefly on the specific methods used by each consultant in determining cost of capital. First, we can say that the most important issue is the cost of equity capital. The nature of the problem faced by this Company is perfectly clear. Its problems do not stem in major part from increases in operating expense. While operating ratio has deteriorated to some extent, the more important problem is that the return element has increasingly had to be used in recent years to meet the cost of debt and preferred stock. The increasing cost of debt is a phenomenon which hardly needs belaboring in this opinion. It is a problem with which almost all of us are familiar and which is fully substantiated in this record. The point is that these unprecedentedly high interest rates have been consuming an increasing proportion of Pepco's return and leaving a smaller return for the common equity. Unless this situation is recognized and a proper return for common is permitted, the Company will experience difficulty in marketing new equity securities without diluting present shares -- a result which all analysts agree is extremely undesirable.

The first task, therefore, is to give proper recognition to the cost of debt and preferred stock. Both Dr. Morton and Dr. Thatcher rely on the embedded cost of debt and preferred stock in computing the overall cost of capital. However, there were variations in their

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4/ In so ruling, we are being consistent with past Commission policy. See Re Potomac Electric Power Co., 64 PUR 3rd 364, 383 (D.C. P.S.C. 1966).

approaches and we must resolve the questions thus raised. First, in accordance with our decision as to test year, we will base our computation in the first instance on the cost of debt and preferred stock in the twelve months ended June 30, 1969. According to Dr. Thatcher, that figure was 5.14% for debt and 5.60% for preferred stock.5/ We will, however, make an adjustment in that figure. On February 18, 1970, following the close of hearings in Phase I of this proceeding, Pepco issued new long-term debt and preferred stock. The cost of the debt in that issue was 8.93% and the cost of preferred stock was 9.11%. The proceeds of the issue were used to retire bank loans. Thus, following that issue and the retirement of higher cost bank loans, the embedded cost of debt became 5.13% and the embedded cost of preferred stock became 6.42%. Pepco filed a motion on February 19, 1970, asking that we take this new issue into account in making our calculations. That approach was opposed by GSA who suggested that if we recognized this new issue we would fall into the error of recognizing increasing expense without taking into account increasing revenues. Having considered the question, we have concluded that we should recognize the February 18, 1970 issues of securities and the bank loan retirements in computing embedded cost of debt and preferred stock.

We are mindful, first, of the task we are undertaking here. We are attempting to establish the cost of capital for Pepco for a period in the future. The first element is the cost of debt and preferred stock and in accordance with the analysis of all the expert testimony, we base our computation on the embedded cost of those types of securities. It is frankly too unrealistic and theoretical for us to ignore the issuance of securities which have already had an undeniable and continuing effect on the cost of debt and preferred stock.

Nor do we think we are violating the test year principle in so ruling. That concept has its principal utility in analyzing operating revenues and expenses. In making such an analysis, it is vitally important to match revenues and the expenses incurred in producing those revenues. Our present task is of a different nature. We are attempting to analyze the adequacy of the return to be allowed over and above expenses. The adequacy of that figure is not affected by variations in operating expenses during a given period. Hence, we feel that we should use the most accurate figure available to us.

5/ Dr. Morton provided no figure for that period. However, his methodology is essentially the same as Dr. Thatcher's.

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We have noted GSA's argument that if we use the figures relating to the latest securities issue, we may be overlooking the possibility that cost of debt may actually decline from present levels. However, in order to make our figure an overstatement, the cost of debt would not simply have to decline; it would have to decline to a level lower than the 5.13% embedded cost. We see no realistic possibility of this occurring in any future period which is sufficiently close that it should be taken into account for rate-making purposes.

For all these reasons, we believe that in computing the overall cost of capital, we should use a cost of debt and preferred stock which takes into account the Company's latest issue of that type of security. Thus, we find that Pepco's cost of debt is 5.13% and its cost of preferred stock is 6.42%.

We can turn again, therefore, to the question of the cost to Pepco of common equity. We think it must be acknowledged at the outset that, in the final analysis, the answer to this question lies in the realm of judgment. There is no mathematical or other analytical approach which can provide a firm answer to the cost of equity problem. We have attempted, therefore, to absorb all of the data and to understand the analysis which has been provided us in this record and, thereby, to make our exercise of judgment an informed one.

We have noted, for instance, that both Dr. Morton and Dr. Thatcher agree that the market-to-book ratio of the Company's common stock is a significant factor to be considered by us. Dr. Morton, as previously noted, has used data as to market-to-book ratios of various groups of companies, including industrial concerns, to determine what level of market-to-book ratio Pepco should enjoy. He has then computed the level of earnings which would be necessary to bring Pepco up to that market-to-book ratio. As indicated earlier, we do not feel that we should place complete reliance on Dr. Morton's figures because of his use of data concerning industrial firms. However, we have studied the data he has provided concerning both utilities and industrial firms. Further, we have treated his analysis as a reasoned, rational, and informed approach to determining the cost of equity capital. Thus, while we believe his ultimate result is too high, his analysis has been taken into account in forming our own judgment.

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Drs. Thatcher and Thompson have also analyzed the problem in a thoroughly professional, reasonable, and scholarly manner, and we have found their study useful in forming our judgment. They recognize that the cost of equity must take into account not only current earnings and yield. They then employ a number of analytical tools to gauge the extent to which we should allow for growth. One analysis simply measures the growth in book value per share which has been experienced and adds that growth rate to the average dividend yield. Another method combines dividend yield with the growth rate in earnings per share. A much more complex and mathematically sophisticated analysis takes into account both growth in assets and shares, on the one hand, and the market-to-book ratio, on the other hand. Having provided data for Pepco and for other utilities, Drs. Thatcher and Thompson utilize that data to compute the cost of equity by each of their three theories. As previously noted, their conclusions on cost of equity range from 11.1 to 12.3% while Dr. Morton concluded that equity cost Pepco 12 to 13%.

It is our own conclusion, first, that the cost of equity is in the general range which both Drs. Thatcher and Morton discuss, i.e., somewhere between 11 and 13%. We think that it is not as high as Dr. Morton would have us conclude, however, because of his reliance on earnings of industrial concerns.

Having weighed all the data and testimony, we have concluded that Pepco's cost of equity is between 11.19% and 12.55%. When combined with its embedded cost of debt of 5.13% and preferred stock at 6.42%, as previously determined, we conclude that the fair rate of return for Pepco should be in a range between 7.1% and 7.5%.

Our computation of rate of return is, of course, based on certain assumptions as to Pepco's capital structure. The record shows that Pepco's debt constitutes 55.8% of its capital after adjustment for the February 18, 1970 financing. To establish the percentages of common and preferred stock, however, it was necessary to resolve a dispute as to the proper treatment of convertible preferred stock.

In June, 1966, Pepco issued $26,147,000 of convertible preferred stock. The conversion price was set at $22.22 per share, subject to adjustments and currently stands at $21.31. In its presentation, Pepco assumed the conversion of all the preferred stock to common stock and thus adjusted the percentages of common and preferred equity in the

capital structure. In reviewing the record, it was determined that of the 522,940 shares issued in June, 1966, 516,149 remained outstanding as of December 31, 1968, representing more than 98% of the original issue. As of December 31, 1969, 514,902 shares remained outstanding. In our Order No. 4525, dated April 10, 1959, 28 PUR 3rd 206, wherein we treated convertible debentures of Pepco as common equity, we commented favorably upon testimony by the Company that there was every reason to believe that all or a substantial portion of the outstanding debentures would be converted prior to the issuance of the Commission's Order. In this proceeding, we have not had such comment from the Company, nor is it reasonable to anticipate in light of current stock market conditions; the price and dividend policy with reference to Pepco's common stock; and the current conversion price of the preferred stock, that conversion will take place in the near future. We shall, therefore, adopt a capital structure which does not include the 1966 issue of convertible preferred stock as common equity. We find, therefore, that after adjustment for the February 18, 1970 financing that Pepco has 29.4% common stock and 14.8% preferred stock in its capital structure.

As previously noted, we have established that a fair rate of return for Pepco is in the range from 7.1% to 7.5%. We must determine a level within that range on the basis of which to adjust Pepco's rates. We have previously determined that we are justified in this proceeding in using an end-of-period rate base in setting future rates. That decision has the effect of taking into account the adverse inflationary factors which will bear upon the Company's actual earnings experience. Moreover, we are mindful of the fact that during the test period, construction work in progress was at an unusually high level in the rate base due to work on the Morgantown and Conemaugh plants. Those plants will be coming into service in the near future and will have a significant impact upon the Company's operating costs. Taking all these considerations into account, we believe that we should use the lower end of the range in adjusting rates. Thus, our computation of the revenue requirement will be based upon a 7.1% return on the end-of-period rate base for the twelve months ended June 30, 1969.

OTHER ISSUES

We have determined, thus far, Pepco's operating results during the appropriate test period, its rate base during that same period (including the determination to use an end-of-period rate base), and the fair rate of return to be applied to that rate base. In terms of usual rate case analysis, we could now turn to a computation of Pepco's revenue requirement -- our ultimate objective in Phase I of this proceeding.

However, the intervenors in the case have raised a variety of issues which, while not falling within the usual rate case framework, merit our serious attention. We turn now to a consideration of those issues.

Pennsylvania-New Jersey-Maryland Interconnection

The question of the Company's membership in the Pennsylvania-New Jersey-Maryland interconnection (PJM) was raised primarily by GSA, with other intervenors expressing concern over the same subject. The matter was thoroughly explored on the record. PJM is the interconnected power pool covering the states of Pennsylvania, New Jersey, Maryland, Delaware and the District of Columbia.

The basic question raised by GSA is whether the payment terms for transactions between PJM members create an undue burden for Pepco customers.

To understand the PJM settlement arrangements, one must first have a clear understanding of the obligations of each member with respect to the amount of capacity it is to install. The evidence is clear and unrefuted that Pepco, like the other PJM members, bases its decisions on capacity on the demands of its own customers. Its objective is to install sufficient capacity to meet those demands and to provide a reserve of 10%. The 10% reserve is less than the reserve which would be needed if Pepco operated independent of PJM and, indeed, there are times when a given member, including Pepco, has less than a 10% reserve.

The important fact, to repeat, is that Pepco's decisions on the capacity to be installed are based on the demands of its own customers. Those demands, as experienced by Pepco, create a high summer peak demand and a lower level of demand at other times. This means that Pepco has a low annual load factor.

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Having made, and acted upon, its decisions as to the amount of capacity to be installed, Pepco then enters into transactions with PJM members. There are three types of transactions: (1) installed capacity transactions; (2) operating capacity transactions; and (3) economy energy transactions.

Installed capacity transactions involve each PJM member's ability to meet the peak demand imposed on its system (plus a 10% reserve). The formula measures both the ability to meet the annual peak demand and the average weekly peak demand. For any deficiency in capacity to meet peak demand, each member pays $10.40 per kilowatt-year of deficiency. Pepco has had a deficiency in capacity to meet its peak demand in seven out of the last ten years.

Operating capacity transactions involve the provision of the lowest cost generation available to meet each company's operating load plus the PJM operating reserve requirement. Pepco, for instance, might need an additional 200 megawatts (mw) of operating capacity at a given time to meet its load and provide the required reserve. If it can purchase this operating capacity from another PJM member at a lower cost than it would cost to provide it from its own system, Pepco would purchase operating capacity. The purchaser pays the following costs: boiler and turbine starting costs, if the machine is not already spinning; turbine maintenance; turbine no-load costs; additional labor if required.

Economy energy transactions involve the sale, not of capacity, but of energy itself. The objective of these transactions is to utilize, on the PJM, the lowest cost energy available on the system as a whole.

Economy energy transactions within PJM are handled under the following procedures. A selling company computes its highest incremental cost of generation for units operating on its system. The buying company computes what its incremental cost would be to generate the amount of energy required by it during the period involved. These two figures are then totaled and the buying company pays to the selling company one-half of this total. A typical example of this kind of transaction appears at p. 1256 of the transcript where the Company's witness, Springmann, stated:

> "...For example, on August 15, 1969, for the hour ending at 9:00 a.m., Pepco was a selling company and its incremental cost for 202.2 mwh supplied by it to the Interconnection

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> during that hour was $1,314.52. The average of the buyers' cost was $2,402.20; and when these two costs are added and then divided by two the resulting figure of $1,858.36 is the amount that Pepco received for this energy, which resulted in a $543.84 saving to Pepco."

As previously noted, Pepco has a low annual load factor. Thus, during much of the year, it can provide substantial amounts of energy for sale to PJM. Because of its efficient plants, Pepco offers low cost energy. As a consequence, Pepco is a very substantial seller of economy energy to PJM.

GSA argued that these large amounts of economy energy sales were somehow detrimental to Pepco customers. We find this contention completely unsupported. There is absolutely no basis on which to doubt that Pepco's installed capacity is based on the demands of its own customers. Because of its low load factor, it might be the case that much of this capacity would sit idle for large portions of the year. However, because of its membership in PJM, Pepco can utilize this capacity to sell economy energy to the interchange, realizing some revenue above its incremental costs. Thus, the PJM economy energy sales result in substantial benefits to Pepco customers.

In this connection, GSA suggested the possibility that Pepco was not in fact recovering the incremental cost of its economy energy sales. We have carefully examined the record in this regard and find no basis for such a conclusion. The Company witness explained how the incremental costs were determined and, in our judgment, all such costs are recovered.6/

There can be no doubt that the PJM provides an economic benefit to Pepco and its customers. Without it, Pepco would have had to install substantially greater capacity than it now has. It has been depending upon PJM to provide yearly peaking capacity sufficient even to provide a 10% reserve. Without PJM, Pepco would not only have to provide a reserve at that level but a substantially greater amount to meet reliability requirements. Because of its low load factor,

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6/ We are constrained to say that we find it difficult to believe in any event that the arrangements of the PJM companies would acquiesce in a formula for determining incremental costs that would not permit the recovery of all such costs. These are, after all, profit-making enterprises and there would be no reason to impose such a burden either on the ratepayer or the company's stockholders.

much of this capacity would sit idle during large parts of the year. Because of PJM, it can be used to produce economy energy and provide revenues which benefit the Pepco customer. We find no reason in this record to attack or seek modifications in the PJM arrangements.

In this connection, it was suggested by GSA that the capacity shortage problems encountered on PJM in the summer of 1969 and anticipated in the summer of 1970 suggest that the PJM settlement arrangements are faulty. Somehow, it is suggested, these settlement arrangements have caused the capacity shortages.

We are acutely aware of the capacity problems on PJM. We have devoted considerable time to it apart from the context of this proceeding. This Commission has joined with the other PJM state commissions in a unique regional effort to assure the reliability of the pool and to avoid power failures, blackouts, and power shortages, brownouts, within the pool area. Without relying on our knowledge gained from these continuing efforts, we find that there is nothing in this record which remotely suggests that these problems can be laid at the feet of the PJM settlement arrangements. They have their causes elsewhere, in unexpected growth in demand and in unanticipated slippage in placing plants in service. These problems will continue to receive our attention. They require no action in this rate proceeding, however.

Ability to Pay

Some of the intervenors in this proceeding suggested that, in analyzing the rate of return question, we were concentrating on the needs of the Company's investors but ignoring the interest of the customer, specifically his ability to pay. We do not agree with this characterization of our approach. We are acutely aware of our responsibility to the customer and concerned that he pay no more than necessary for this vital utility service. However, we believe that the customer is being treated fairly if he pays no more than the cost of the service he is provided. Within that cost must be included the fair profit required to enable the Company to be competitive in the capital markets. Accordingly, in making a close and detailed analysis of the rate of return, our primary objective is to protect the consumer by ensuring that the return provided the Company by the customer is no more than is needed to maintain the Company's financial health.

If we discharge our responsibility in this regard fairly, we feel that the interest of the consumer in a just rate has been fully protected by our action.

Jurisdictional Allocation Problems

Pepco's service area includes portions of Maryland and Virginia contiguous with the District of Columbia including about one-half of Montgomery and Prince Georges Counties in Maryland and a small portion of Arlington County in Virginia. In addition, certain of its sales are in interstate commerce and are subject to the jurisdiction of the Federal Power Commission. We are faced, therefore, with the question of whether it is appropriate to employ system-wide investment and revenue and expense figures in dealing with the problem of fixing just and reasonable rates for the sales within the District of Columbia. Only the latter sales are subject to the jurisdiction of this Commission. As we stated in Order No. 5419, dated January 30, 1970, we believe it is proper that we treat Pepco on a system-wide basis because there has been no showing of any significant difference in cost of service to customers in Maryland, the District of Columbia, or Virginia.

In response to suggestions of the staff, Pepco, through its witness Frank S. Walters, presented a cost allocation study in which all of the Company's costs of doing business are analyzed and assigned among the several jurisdictional segments. The study is based upon two broad, general principles.

First, electricity, once produced, is co-mingled with all other electricity produced or purchased throughout the system. On this basis, expenses and investment in generation stations, transmission lines, and substations are allocated to all customers within the system. Pepco has made such an allocation based upon the "average-excess" coefficient method. This method allocates 45.79% of the power supply investment to the District of Columbia, 47.91% to the State of Maryland, 2.91% to the State of Virginia, and 3.39% to sales under jurisdiction of the Federal Power Commission. It is one of many methods which are used in making allocations and is considered acceptable by economic experts and by regulatory authorities. The Commission's staff tested Pepco's results using different methods including peak demand coefficients, non-coincident demand coefficients, and energy usage, and found no significant difference in results. The staff evaluated the method used by the Company in light of tests suggested by a committee of NARUC, including such items as relative stability, a minimum of measurements, and recognition of demand for electricity, use of electricity, and time of use.

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The second guiding principle in the jurisdictional allocation is that in considering facilities directly serving individual customers or groups of customers, the costs of owning and operating those facilities are properly assignable only to those customers which they serve. As a consequence, the investment and related expenses in distribution sub-stations, primary and secondary lines, service connections and meters are largely allocated on the basis of actual, physical location. In the study, more than 80% of the investment in overhead poles and conductors used on primary service lines was allocated to Maryland customers, while more than 65% of the underground conduit and conductors used on primary service lines was allocated to District of Columbia customers, reflecting the different servicing characteristics of the system. In a similar fashion, 86% of the street lighting and traffic signals investment was allocated to the District of Columbia based upon the extensive usage of such equipment within the District. Application of the allocation ratios produce an overall allocation to the District of Columbia of 48.95% of the total system investment. Similar overall allocations to Maryland, Virginia, and sales under the jurisdiction of the Federal Power Commission are 46.59%, 2.45%, and 2.01% respectively.

Operating expenses are allocated under the same general principles except that certain expenses such as customer accounts and sales expenses are allocated on bases such as numbers of customers, customer growth, or growth in usage in kilowatt-hours. Operating income is directly assigned to each jurisdiction. Use of these allocation methods assigns revenues and expenses as follows:

	Operating revenues	Operating expenses
District of Columbia	46.56%	45.72%
Maryland	48.83%	49.50%
Virginia	2.44%	2.47%
Sales subject to FPC	2.17%	2.31%

The study further shows that, using year-end investment, the system-wide rate of return for the year 1968 was 6.07%. The return from the District of Columbia was 6.03%; from Maryland the return was 6.15%; from Virginia 5.89%; and from sales subject to the Federal Power Commission 5.48%.

The staff, after reviewing all allocations and results, reached conclusions similar to those drawn by the Company witness. It concluded that the cost of serving a customer in the District of Columbia does not

vary substantially from the cost of serving a customer in Maryland or Virginia and thus it appeared reasonable to the staff to use system-wide data in developing the revenue requirements of Pepco.

There has been no testimony in this proceeding which disputes the conclusions reached by the Company and the Commission staff.

We, therefore, find that in the light of the undisputed evidence, the service area of the Company in the District of Columbia and in portions of Maryland and Virginia constitute a homogenous and integrated metropolitan area; that the Company's investments have been made upon system-wide needs in the area; that the plant and facilities have been designed and constructed to serve the area as a single system; and that the operations of the Company have been conducted on a system-wide basis without regard to geographical boundaries. We find further that there is no significant difference in the cost of serving customers in the various political jurisdictions in which Pepco operates. From the foregoing findings, we conclude that the Company's revenue needs and its return should be established on a system-wide basis, provided, of course, that this Commission and the other Commissions agree upon the rate of return, rate base, revenue requirement to be allowed in this proceeding.

In this connection, we have maintained close contact and liaison with the Maryland Commission on this case. When the Phase I record was complete, we engaged in thorough discussions with the Maryland Commission as to the result which should be reached. Reaching a final result in a rate proceeding such as this ultimately becomes a matter of judgment for the Commission members. Each Commission must exercise that judgment independently, of course, since we each have a responsibility to the jurisdiction we serve. After our lengthy discussions with the Maryland Commission, it appears to have developed that our judgment as to the rate increase necessary for this Company differs from that of the Maryland Commissioners. 7/ We felt that adjusting rates on the basis of 7.1% rate of return on the end-of-period rate base amounting to $854,341,390, thus allowing an increase of $22,103,781, would provide the Company with adequate revenues. The Maryland Commission, in the considered exercise of its own judgment, is considering the use of a higher rate base figure and a higher rate of return. If they so conclude on a final basis, they would grant a higher increase in Maryland than we have allowed in the District of Columbia.

7/ As this opinion is issued, the Maryland Commission has not completed its determination of the issues. It has communicated to us, however, its tentative thinking at this time.

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While both Commissions wished to preserve uniform rates, if possible, our possible difference of opinion as to the increase required may lead to a difference in rates. This is perhaps unfortunate, but understandable in light of our independent responsibilities on rate-making questions. Thus, while the jurisdictional allocation study justifies a system-wide treatment of costs, revenues, and plant, we may have different rates based upon the difference in return which each Commission would allow.

In our own case, having determined that Pepco requires an increase in its operating revenues in the amount of $22,103,781 in order for it to achieve a reasonable and adequate return for its entire system, we have considered how much of that increase should be provided by customers within the District of Columbia. During the test year, 46.24% of the total sales of electricity were derived from customers within the District of Columbia. Consistent with our use of test year data throughout this Order, it appears reasonable that approximately 46.24% of the total increase in revenues should be derived from customers within the District of Columbia. This amount is $10,220,788. We shall, in our Order, direct the Company to present rate schedules applicable to the District of Columbia which when applied to consumer usages during the test year will produce $10,220,788 of additional revenue.

Pepco Earnings Since 1966

The Consumer Council of CHANGE, Inc., argued that any increase granted Pepco should be adjusted downward by taking into account Pepco earnings since its last rate case in excess of the 6.3% rate of return authorized in that case. It is argued that there is language in Judge Bazelon's opinion in Washington Gas Light Co. v. Baker, 188 F. 2d 11, 89 PUR NS 177, (D.C. Cir. 1950) which both authorizes and requires us to inquire into the question of excessive earnings in the past, and that the "water over the dam" theory is merely a statement of judicial self-restraint in reviewing Commission decisions, not a principle which limits or precludes the exercise of Commission discretion.

We are unable to accept this proposition as a correct statement of legal principle. Moreover, there is no evidence in this record on which we could base a finding that Pepco's earnings since its last rate case are excessive.

First, on the legal point, we believe that it has been well settled that the "water over the dam" principle is binding on regulatory bodies. The validity of this principle, specifically recognized by Baker, supra, can be traced at least as far back as Knoxville v. Knoxville Water Co., 212 U.S. 1, 14 (1909), and through Galveston Electric Co. v. Galveston, 258 U.S. 388, 395 (1922); Georgia Ry. v. R.R. Commission, 262 U.S. 625, 632 (1923); Re Washington Gas Light Company, 24 PUR 3d 417, 439, (D.C. P.U.C., 1958); and Mississippi Power & Light Co. v. Blake, 109 So. 2d 657, 28 PUR 3d 465 (Miss. Sup. Ct., 1959), together with the cases cited by the court in Baker. See also New Jersey Power & Light Co. v. State Department of Public Utilities, 104 A 2d 1, 4 PUR 3d 7 (N.J. Sup. Ct., 1954). We read Judge Bazelon's comment on the equitable sharing of the burden of inadequate charges for depreciation in the past in the factual context in which it was made, not as an affirmation of general authority in the Commission to disregard long-standing judicial precedent on equitable grounds.

Moreover, intervenor's argument misconstrues the purport of a determination of a rate of return in a rate proceeding. The Commission's task in such a proceeding is to set rates which are just, reasonable and non-discriminatory. In discharging that task, the Commission determines how much revenue the utility requires. This, in turn, leads to a determination of a fair rate of return as one component of a revenue requirement. The Commission then sets rates to produce that required revenue. Once set, those rates are "the lawful rates", are the only rates which may be charged by the utility,and are "...prima facie reasonable until finally found otherwise in an action brought for that purpose." (43 D.C. Code

§329, 703) The rate of return determination made in a rate proceeding cannot be regarded as a fixed and continuing touchstone, the exceeding of which indicates the presence of excessive rates. At the same time that the return experienced changes, economic conditions might also be changing and requiring a different return. By our specific statute, however, the authorized rates are prima facie reasonable until a new determination is made in a new formal rate proceeding. Thus, there is no basis on which it can be said that the evidence adduced in this record shows that the returns earned since our 1966 Pepco rate decision were excessive.

Finally, we think that intervenors overlook the dangers for the consumer interest in the position they urge. If the principle is valid for so-called excessive earnings, it is just as good for earnings lower than those last authorized. They could open the way for a utility which has been meeting adverse financial results to have ratepayers make up an alleged deficiency in past earnings. In those circumstances, we think that intervenors would view the situation differently.

Equal Employment Opportunity

We turn now to the matter of the adequacy of Pepco's equal employment policies and practices. Serious questions concerning this subject were raised by certain intervenors, particularly the Washington Urban League. The Urban League offered in evidence the Equal Employment Opportunity Employer Information Report, EEO-1, filed by Pepco with the Joint Reporting Committee of the Equal Employment Opportunity Commission, Office of Federal Contract Compliance and Plans for Progress Program, on May 29, 1969 covering employment as of December 31, 1968. In addition, it offered testimony from three Pepco employees concerning their own employment experiences at Pepco. There was also considerable discussion of employment practices at Pepco during the evening session of December 17, 1969 when we provided an opportunity for interested members of the public to present their views to us. The Company offered no evidence of its own on this subject nor did it cross-examine the witnesses called by the Urban League.

We have already indicated our concern with this subject. In Order No. 5419, in which we granted interim rate relief, we said that we found the testimony "deeply disturbing" and that "...the issue of employment practices will be the subject of a full treatment and the fullest exercise of the Commission's authority..." in our final order.

There are three major questions which we must resolve in dealing

with this issue of equal employment opportunity. First, is this a subject matter with which we should be concerned, both in general, and particularly in the context of a rate case? Second, if so, is there sufficient evidence in this record to provide us with a basis for action? Third, if action is justified, precisely what action should be taken?

We have no doubt that we should be vitally concerned with Pepco's equal employment policies and practices. There can be no doubt that the provision of equal employment opportunity is required by the laws of the United States and of the District of Columbia. We refer specifically to the Civil Rights Act of 1964 (P.L. 88-352, approved July 2, 1964, 78 Stat. 241), Executive Order No. 11246, and D.C. Commissioners Order No. 65-768. When it is brought to our attention that the requirements of the law are not being met by a utility subject to our jurisdiction, we are clearly expected to act. Thus, in creating this Commission, Congress said:

> "The Commission shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of chapters 1-10 of this title, and with all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility...." 43 D.C. Code §303 [Emphasis supplied.]

Further, in defining our general powers, Congress gave us the power to investigate the methods used in manufacturing electricity and to order such improvements as will reasonably promote the public interest. (43 D.C. Code §601) We believe that a concern with equal opportunity employment falls within that language. 8/

There can be no question, therefore, that this Commission should properly be concerned with any deficiency in Pepco's equal employment policies and practices. We turn next to the question whether there is evidence in this record of such deficiencies. We believe that there is.

Specifically, we find that the statistics set out on Pepco's Form EEO-1 as of December 31, 1968, offered in evidence by the Urban League, provide a sufficient basis to require Pepco to modify its employment practices. Those figures reveal the following picture:

8/ The holding in Re Capital Transit Co., 58 PUR(NS) 189 (Order No. 2912, April 20, 1945) that we should not assume power in the equal employment area can no longer be regarded as having vitality. Since that decision was rendered, the provision of equal employment opportunity has not only become a matter of stated public policy, it is required by law. The "Congressional approval and direction" which the Commission found lacking in 1945 has now been amply provided.

	Total Employees	Negroes	Percentage
Officials and Managers	538	4	.7%
Professionals	80	3	3.75%
Technicians	182	19	10.4%
Office and Clerical	873	165	18.9%
Craftsmen (Skilled)	1,134	21	1.8%
Operatives	805	302	37.5%
Laborers (Unskilled)	138	136	98.6%
Service Workers	218	140	64.2%
	3,968	790	19.9%

The Company employs no Orientals, American Indians or Spanish surnamed Americans and those Negroes employed are concentrated in the lower income areas. We are particularly struck by the paucity of Negro employees in these categories listed above the "Operatives" classification. In this community, these statistics reveal a situation of serious concern.

Thus, these statistics reveal a vivid picture of inadequate performance of the Company's obligation to provide employment opportunities without regard to race, creed, or national origin. Further, we view these statistics in light of the real life experiences related to us in the sworn testimony of Pepco employees called by the Urban League. Those experiences, while limited in number, flesh out the statistical picture and confirm the inference that proper employment practices are not being pursued at Pepco.

In addition, we do not feel that we must ignore the unsworn statements made by Company employees and others at our evening hearing on December 17, 1969 as Company counsel suggests. For us to do this would make a mockery of our own rules which give every citizen a right to have his views considered by the Commission. This is especially true in view of the Company's failure to affirmatively attempt to refute any of the allegations made in regard to this issue. This is not to say that we have based our findings and conclusions directly on the statements made at that hearing session. However, these statements have been considered as providing a background in which to consider the exhibits and sworn testimony on which we do rely.

We have concluded, then, that we have the power to act and that the evidence of record justifies action. We now turn to what should be done.

It has been suggested that we should grant no rate increase until we can conclude that Pepco's equal employment practices have been corrected. We have rejected that course of action. First, we do not believe that this record contains a sufficient evidentiary basis for such

action. There is no substantial evidence of a link between Pepco's employment practices and its cost of service. There was discussion of a possible cost impact but it was entirely on a theoretical basis. We do not reach the question, therefore, whether we have the power to refuse rate relief on the basis of Pepco's employment practices. We conclude simply that this record would not, in any event, support such an action.

Instead of dealing with the problem in rate relief terms, we will take action to deal with the problem directly. The issue has properly been raised before us. Indeed, Pepco raised no objection to its introduction into this proceeding. Hence we will, in our rate case order, direct that the necessary action be taken. Pepco suggests that we need take no action and that the matter should simply be referred to other organs of Government concerned with discrimination, e.g., the Equal Employment Opportunity Commission, the U.S. Department of Labor or the D.C. Human Relations Commission. For the reasons already discussed, we do not agree. We have both the power and the responsibility to take action ourselves.

Our decision as to the action which should be taken has been shaped by two principal considerations. First, we are convinced that a successful program to provide equal employment opportunity must have as its impetus strong guidance and support from the highest echelons of Company management. If the Company's top management makes it known that it is strongly committed to these goals, then the barriers to equal employment opportunity which spring from attitudes or ingrained practices at middle or lower management levels will give way. Second, we believe that vague discussion or exhortation is not enough. There must be a program for affirmative action to eliminate employment discrimination. We have worked out such a program, having obtained assistance from the staff of EEOC, and we will direct the Company to institute it forthwith. We will monitor progress by means of regular reports and we will use the Commission's powers to further progress when necessary. Further, we will have continuing discussion with the Company's top management to assure ourselves that they are committed to the program and are communicating that commitment to their subordinates.

PEPCO'S REVENUE REQUIREMENT

Having discussed the issues raised by the intervening parties, we should pull together our conclusions on those basic factors which determine Pepco's revenue requirement for the future. We have found that Pepco's end-of-period rate base as of June 30, 1969 was $854,341,390. We have found that a fair rate of return for Pepco is in a range between 7.1% and 7.5% and that in setting future rates, we should use the lower end of this scale, i.e., 7.1%. Applying this figure to the rate base set forth above, we find that Pepco's revenue requirement is $60,743,673. In the test year, Pepco had net operating income of $50,155,962. Accordingly, Pepco requires an increase in net operating income of $10,587,711. Taking into account the effect of income taxes, we conclude that Pepco requires an increase of $22,103,781 in gross revenues. This is an increase of 12.5%. The interim increase of 5% would bring an increase of $8,830,093. Accordingly, new rates providing a further increase in total system revenues of $13,273,688 or 7.5% must be established.

However, since it may not be possible to achieve uniform rates on a system-wide basis, our order will be applicable only to District of Columbia customers. Since the record shows that D.C. customers produced 46.24% of total system revenues during the test year, we will direct that increases in D.C. rates be sufficient to produce approximately 46.24% of the total system increase we have found to be necessary. Accordingly, revenues from D.C. customers will be increased by a total of about $10,220,788. The interim increase is already producing $4,083,026 of this amount from D.C. customers. The permanent rate adjustments for D.C. customers should produce that amount plus an additional $6,137,762. Thus, the total revenue increase from rates for D.C. customers will be 12.5%.

FINDINGS

Based upon the record made in this proceeding and the foregoing analyses and considerations, this Commission finds that

1. The applicant's end-of-period rate base for the year ended June 30, 1969, is $854,341,390.

2. The adjusted net operating income for the year ended June 30, 1969, was $50,155,962.

Order No. 5429, page 45.

3. The rate of return on applicant's level of earnings for the test period is 6.27%.

4. The end-of-period rate base for the year ended June 30, 1969, is appropriate for determination of the applicant's future revenue requirements.

5. A fair and reasonable rate of return is in a range between 7.1% and 7.5%.

6. In determining future revenue requirements, a rate of return level of 7.1% should be utilized.

7. The applicant must increase its system-wide net operating income by $10,587,711, which with allowance for taxes amounts to an increase of approximately $22,103,781 in system-wide gross operating revenue.

8. Included in the foregoing increase in system-wide gross operating revenues is the $8,830,073 increase granted by the 5% interim increase allowed by Order No. 5419, dated January 30, 1970.

9. District of Columbia customers should provide approximately 46.24% of the total required increase of $22,103,781.

10. Thus, the permanent rate adjustments should provide an increase in revenues from District of Columbia customers of $10,220,788; this amount including the increased revenues already being produced by the 5% interim surcharge ordered in Order No. 5419.

THEREFORE, IT IS ORDERED:

Section 1. That the Potomac Electric Power Company be, and it is hereby, directed to submit to this Commission by Friday, May 8, 1970, proposed schedules and written testimony in support thereof, designed to increase its gross operating revenues within the District of Columbia on an annual basis by $10,220,788 from the level in the test year in accordance with the findings and conclusions accompanying this Order.

Order No. 5429, page 46.

Section 2. That copies of the proposed rate schedules and written testimony in support thereof required by Section 1 hereof be served upon the parties of record in this proceeding at the time of filing with this Commission.

Section 3. That a public hearing on the implementation of this Opinion and Order, Phase II of this proceeding, be held on Monday, May 25, 1970, at 10:00 a.m. in Room 314, Cafritz Building, 1625 I Street, N.W., at which time the written testimony of the Potomac Electric Power Company will be received and testimony in behalf of the staff and/or the intervenors will be heard.

Section 4. That the Potomac Electric Power Company shall establish an affirmative action program for equal employment opportunity which complies in all respects with the requirements of Appendix A to this Order.

A TRUE COPY:

By the Commission:

George A. Avery
Chairman

Chief Clerk

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 5434

June 12, 1970

IN THE MATTER OF	)	
	)	
Application of POTOMAC ELECTRIC POWER COMPANY for an increase in rates for retail electric service.	)	Formal Case No. 541

The Commission has before it the following Petitions for Reconsideration of Order No. 5429 and, in some cases, Order No. 5419:

1. Petition for Reconsideration filed by Leonard S. Goodman on May 14, 1970.

2. Petition for Reconsideration of Robert L. Kunzig, Administrator of General Services on Behalf of the United States, filed May 14, 1970.

3. Potomac Electric Power Company Application for Reconsideration of Section 4 of Order No. 5429 and Motion to Institute Separate Proceeding with Respect Thereto, filed May 15, 1970.

4. Electric Utility Employees' Union Application for Reconsideration of Section 4 of Order No. 5429, filed May 15, 1970.

Each of these petitions will be discussed in turn.

I

Goodman Petition

We have carefully considered the points raised by Mr. Goodman and have concluded that they offer no basis on which to reconsider our earlier decisions. We will discuss his arguments in turn.

1. Effect of New Plant

As is the practice of this Commission, and of most Commissions in setting rates, we determined Pepco's revenue requirement by examining their financial results during a test period, in this case the twelve months ended June 30, 1969. The revenues, expenses, and rate base for that period were carefully audited and adjustments were made for known changes in the immediate future. On the basis of the results thus determined, we determined that Pepco's rates were not producing an adequate return and ordered an adjustment in rates.

Mr. Goodman's first suggestion is that we erred in not making an adjustment to test year results by adding $7,000,000 to net operating income for the period. This is the amount, he suggests, by which net operating income will increase because of additions to plant. He suggests that this adjustment be made simply by adding this amount to net operating income directly. He neither provides, nor suggests that we examine, the items of revenue and expense that might lead to this change. Most significantly, he does not even suggest an accompanying change in the rate base. He would have us assume that the company's net operating income has risen due to plant additions but would have us ignore the impact of those additions on the rate base.

We believe, first, that Mr. Goodman's suggested adjustment is highly conjectural. Not having participated in the proceedings, he has developed no facts of record on which to base his assumptions concerning the impact of new plant upon net operating income. He seeks to rely upon comparison of the increase in plant with the increase in net operating income in the years 1964 through 1968. However, the relationships between these two numbers could be affected by a number of factors other than the direct impact of new plant on net operating income. Mr. Goodman himself recognizes this fact when he specifically points out the effect of the 1966 rate reduction. There could well be other factors affecting this relationship. In fact, we pointed out in Order No. 5429 that the relationship between growth in plant and growth in net operating income had been deteriorating in recent periods. See Order No. 5429, p. 14. Hence, we feel that Mr. Goodman is relying on a very slender reed in asking that we make the factual assumption that net operating income will increase in some fixed and ascertainable relationship to growth in plant. To engage in such conjecture would be unsound rate-making policy and practice.

Of even more significance, we think that adopting Mr. Goodman's suggestion would do great violence to the test year concept and its role in ratemaking. Under that concept, the company's revenues, expenses, and rate base are determined for a recent period in the past. Adjustments are made to those figures for known changes. The sufficiency of the company's return in that period is ascertained and adjustments are made to future rates to bring the return to a proper level. The essential elements in the process are, first, a careful analysis of each item of revenue, expense, and rate base and, second, adherence to the principle that like be compared with like, i.e., that adjustments in any one element be reflected in those other elements which would be affected thereby. The test year concept has been universally adopted in the rate-making process and has served its purpose well. To depart from the solid base which it provides in considering revenue needs by making crude and conjectural adjustments to one element of the company's financial picture would be unwise indeed.1/

Mr. Goodman states at p. 2 of his petition that we have assumed that no increased income will arise from additions to plant. We made no such assumption. Indeed, we specifically recognized the impact upon the company's financial situation of the new plant the company will place in service. We gave it effect by basing our determination of revenue requirement on the lowest end of the range of return we had found to be reasonable. (Order No. 5429, p. 30.) We feel that this method is a far more desirable way of taking into account the advantageous effects of new plant than making conjectural adjustments to one portion of the test year results.

2. Construction Work in Progress

Whether construction work in progress should be included in a rate base has been presented as an issue in numerous rate cases. It is now presented for the first time in this case, not, however, on the basis of testimony or evidence of record, but by way of argument on petition for reconsideration. We do not find petitioner's argument on this point convincing, and we will, therefore, reject his contention that our decision to include construction work in progress in Pepco's rate case is unlawful.

1/ In effect, Mr. Goodman is asking us to use a projected test year rather than an historical period since his suggestion would make sense only if all elements of the equation -- revenues, expenses, and rate base -- were adjusted. This was a suggestion urged upon us by the company during the proceeding. The company recognized that using such an approach would lead to the conclusion that a greater increase was necessary than that based on historical period results. We rejected that approach as unsound when suggested by the company. We reject the even more unsound suggestion of Mr. Goodman that we use a projected test year in which only one element of the financial picture is adjusted.

Mr. Goodman either misunderstands or misconstrues the law with respect to inclusion of plant under construction in the rate base. We are fully aware of principles such as those set out in the case which he cites, i.e., Public Service Company of New Hampshire, 92 PUR NS 443 (1951). That case and the cases cited therein establish the principle that construction work in progress should not be included in the rate base when interest is charged on such construction work in progress and capitalized by the utility. Including construction work in progress in that case would provide a double return to the utility. Where that question has been presented to us we have refused to include construction work in progress. See e.g., Re The Chesapeake and Potomac Telephone Company, 57 PUR 3rd 1, 10-11 (1964).

That is not the practice pursued by Pepco, however. They do not capitalize interest during construction. In that instance, the fact that the funds invested in construction are being used for the benefit of the public just as much as funds invested in plant in service can and should be properly recognized by inclusion of construction work in progress in the rate base. This is particularly true where, as here, the record has demonstrated a continuing need for permanently financing a large construction program.

Moreover, we have previously noted that there is no basis on which we can determine whether the impact of construction work in progress upon net operating income, when such plant is completed, will be substantial. In any event, we have given specific effect to this possibility in setting rate of return at the lowest end of the range we have found to be reasonable.

For all these reasons we find no merit whatever in Mr. Goodman's attack upon our treatment of construction work in progress.

3. End-of-Period Rate Base

Mr. Goodman also attacks our use of the end-of-period rate base in determining future revenue requirements.2/ Unlike some of the other points raised by Mr. Goodman, this was a subject much discussed in the hearings and examined at length in our opinion. We might amplify that discussion somewhat in considering Mr. Goodman's views.

2/ We note that Mr. Goodman mischaracterizes our opinion when he asserts that we did not test earnings against average rate base. (Petition, p. 6.) We in fact did test both average and end-of-period rate base but determined to use the end-of-period result in determining future revenue requirements. See Order No. 5429, p. 9

Mr. Goodman argues that we are somehow doublecharging the ratepayer because we also consider the impact of inflation in determining the rate of return. We do indeed give consideration to the effects of inflation in determining rate of return. However, all we are doing there is considering the impact of inflation upon the current cost of capital, both debt and equity. That cost is determined in the marketplace for capital, which is affected by factors affecting the economy generally, including, of course, the impact of inflation. By analyzing cost of capital we determine the reasonable level of return which the company should be permitted to earn. In other words, our rate of return determination merely allows the company to cover the cost of debt capital and make a reasonable return on equity capital in the current money markets.

In using end-of-period rate base, we are not giving double effect to inflation, as charged by Mr. Goodman. Rather, we are seeking to ensure that the company will, in fact, realize the rate of return we have found to be reasonable. It was our judgment that basing rate adjustments on the average rate base would not, in view of the existence of attrition, lead to earnings at the level we had found to be reasonable. The ratepayer, therefore, is not being doublecharged for inflation. A determination has been made as to the proper level of return, and the rates have been adjusted to produce that return. If average rate base were used, the adjustment would be inadequate.

Mr. Goodman's second claim is that our examination of the existence of attrition proves only that construction work in progress is depressing current return. He claims that we have reversed our 1966 holding in the Pepco case, Re Potomac Electric Power Co., 64 PUR 3rd 364 (D.C.P.S.C. 1966), on the proper effect to be given attrition.

We do not agree with his characterization of our treatment here of the 1966 decision. We applied precisely the same tests here as were applied in 1966. In the earlier case, the evidence indicated that no attrition was present. In the present instance, examining precisely the same factors, a contrary indication was found. This is hardly surprising in view of the severe inflation since 1966.

We do not agree with the claim that our analysis shows only the effect of a heavy program of plant expansion. In the absence of attrition, the sums tied up in plant expansion can be "carried" to a substantial degree by the earnings produced by the plant in service. The impact on the company's return which we found to exist goes beyond

the simple impact of plant expansion and significantly reflects the effect of inflation on the earning capacity of plant. Hence, we were justified in using end-of-period rate base in determining future revenue requirements. We note once again the central fact that adopting the other route, use of average rate base, would not, in our judgment, have permitted the company to achieve the level of earnings we had determined to be fair.

In making this judgment, we are hardly striking out on a novel and little used course. Commissions have consistently been using end-of-period rate base where the record indicates that the attritional effects of inflation so require. See Turner, Trends and Topics in Utility Regulation, 747-56 (1st Ed. 1969). We have ourselves used end-of-period rate base in making adjustments in earlier cases. See Order No. 5429, p. 13. We find no basis in Mr. Goodman's petition to reconsider our decision in this instance.

4. Income Taxes

Mr. Goodman contends that we overstated the amount of federal income taxes applicable to the authorized increase in net operating income. Specifically, he objects to the fact that we applied the statutory tax rate rather than the effective tax rate in order to arrive at the authorized increase in gross revenues. Because Pepco's effective tax rate has historically been lower than the statutory rate, says Mr. Goodman, the effective tax rate should have been applied in determining the amount of new gross revenue required by the company. Mr. Goodman further claims that in future years, beyond the test year, the effect of the company's new investment and the continued use of accelerated depreciation will further reduce Pepco's tax bill. Mr. Goodman's approach is both conceptually incorrect and is not borne out by actual experience in the real world.

We might begin by briefly describing our income tax computation. In our Order No. 5429, we provided for an increase in Pepco's after tax net operating income of $10,587,711.3/ We then derived the gross revenue before taxes by adjusting the net operating income to reflect both federal and local income and revenue related taxes, using a composite tax rate of 52.1%. The composite rate was derived from statutory tax rates, both at the local and federal level including a factor for the federal income

3/ See pp. 14-15, infra, for discussion of a further adjustment in the increase required.

tax surcharge at the statutory rate of 5% for one-half year. The composite tax rate is composed of a 3.01% gross receipts tax factor, a 2.69% tax factor for the D.C. Franchise Tax, and a 46.40% factor for the federal income tax. The federal income tax factor of 46.40% on gross revenues equates to 49.20% on net operating income before taxes after giving recognition to the fact that the local taxes are deductible for federal tax purposes. This computation was developed by our staff from Pepco's records as shown in its Exhibit 1D of the interim proceeding in this case.

The method we used is based upon the assumption that once a test year has been selected and once a decision has been made based upon the test year, the increase or decrease in net operating income, from that found to be reasonable for test year, is incremental to the test year data. This assumption (i.e., that all other things remain equal) leads to the conclusion that only those items directly related to changes in revenue need be accounted for. In this case, we have adjusted for the taxes upon the incremental net operating income at the tax burden which the incremental income will bear, i.e., the statutory rate.

Table I, below, shows that during the test year, the company's effective tax rate, that is the federal income taxes as a percentage of net operating income before federal income taxes, was 14.3%. This is shown in Column 1. Column 2 reflects the proposed increased net operating income revenue and taxes as set forth in P.S.C. Order No. 5429. The third column shows the composite effect after application of the newly authorized revenues with a resulting effective tax rate of 23.5%. It appears obvious that if there were no other changes and the tax effect was stated at the effective tax rate, that the company would not be able to earn to the level found just and reasonable by this Commission.

Order No. 5434, page 8.

TABLE I

POTOMAC ELECTRIC POWER COMPANY
RESULTS OF OPERATIONS
TEST YEAR ENDED JUNE 30, 1969

	Staff Exh. 3	P.S.C. Order 5429	Pro forma Results
Operating Revenue	$176,601,852	+ $22,103,781	$198,705,633
Operating Expense	75,767,729		75,767,729
Depreciation	23,613,678		23,613,678
Taxes other than Federal Income	18,692,432	+ 1,259,916	19,952,348
Net Operating Income Before F.I.T.	58,528,013	+ 20,843,865	79,371,878
Federal Income Tax	8,372,051	+ 10,256,154	18,628,205
Net Operating Income	50,155,962	+ 10,587,711	60,743,673
F.I.T. as % of Net Operating Income Before F.I.T.	14.3	49.2	23.5

If we were to adopt Mr. Goodman's hypothesis and use the 14.3% effective rate, we would be making the implicit assumption that all expenses increased in direct proportion to revenues, including such capital related items as depreciation expense and maintenance expense. There is no basis for any such assumption in this record. Moreover, even attempting such an assumption is inconsistent with the test year methodology of ratemaking. We have used the method of giving effect to taxes in rate cases for many years. It is used generally by utility commissions throughout the country in adjusting rates. According to Mr. Goodman's contention, that method would provide a utility with substantially more revenues than are actually needed to produce the desired level of return.4/ If he were correct in this claim, then companies subject to this jurisdiction, and, in fact, utilities throughout the country, would be earning substantially more than authorized by their respective regulatory commissions. No such pattern has appeared. This fact alone belies the validity of Mr. Goodman's suggested approach.

Mr. Goodman cites several cases in support of his position, none of which appears applicable to the instant proceeding. No one is contending in this case, nor has the Commission directed, that Pepco account for its taxes on other than a flow-thru method. In Mid-Western Gas Transmission Company, 64 PUR 3rd 433, the Federal Power Commission decided the use of whether the cost of service for a company using straight-line depreciation should be computed on the basis of liberalized depreciation. This was not an issue in Formal Case No. 541. In United Gas Pipeline Company, 54 PUR 3rd 285, the Federal Power Commission used an effective tax rate over the five-year period in distributing the effects of a consolidated tax filing and of changes in the statutory rate. This issue also is inapplicable to Formal Case No. 541. In addition, it should be noted that these cases both relate to taxes on existing earnings rather than taxes on changes in earnings as a result of a rate case.

Perhaps it should be pointed out that Mr. Goodman obviously does not realize that the increase allowed a utility in a rate case is an allowance of additional net income before taxes and not gross income subject to additional expenses. Such allowance is subject to tax on the entire amount and not only some portion of it.

4/ He claims for instance, that our allowance here was excessive by $8,178,000. If he were right, excess allowances of a similar order of magnitude, with substantial impact on the return actually realized, would be found around the country. We know of no such pattern.

5. Allocation of Increase

Mr. Goodman claims that we have allocated to the District of Columbia customer too large a portion of the total revenue increase we have found to be required. Our allocation was based upon the percentage of revenues produced by D.C. customers during the test year. Mr. Goodman argues that the rate increase is required because of the growth being experienced by the company and would have us base the allocation on the growth rate in kilowatt hour sales and revenues as between the various jurisdictions. We find this suggestion very unsound.

We do not believe that these growth rates provide a sound allocation basis. From an operational standpoint, it is artificial and misleading to regard the growth of the Pepco system in one political jurisdiction which it serves as somehow unrelated to the service being provided in another political jurisdiction. The system is planned and operated as a unified whole. As it grows, plans for generation, transmission, and distribution of power must be made on a system-wide basis. There is no way in which a D.C. resident could validly claim that the Morgantown plant has no effect on his service or that a Maryland resident could claim that he is unaffected by the new peaking unit at Benning. Thus, in setting rates, we regard the drawing of lines on the basis of growth in various areas as unrealistic in operational terms.

The basic factor to be considered in setting rates is the cost of service. If the varying growth rates, or any other factor, affected costs as between political jurisdictions, it would, of course, be proper to give recognition to that factor in setting rates, and particularly in allocating a needed increase. However, in this case, a detailed allocation study was introduced in the record and was essentially undisputed by any party. That study shows that the cost of service is essentially the same for D.C. customers as for Maryland customers. Thus, the varying growth rates to which Mr. Goodman refers do not appear to have affected the cost of service.

In light of this fact, to claim that the growth being experienced in the suburban areas somehow has nothing to do with D.C. customers and that rates in the District should reflect the differing rates of growth would be unrealistic, misleading, and unproductive. We reject Mr. Goodman's claim of error in our method of allocating the required increase.

6. Timeliness of Petition

Pepco has opposed Mr. Goodman's application on the ground that Order No. 5429 merely decided the first phase of this rate proceeding.

That decision, says Pepco, must be implemented by a Phase II order actually adjusting rates. That order will be the final order, in Pepco's view, and applications for reconsideration should not be filed until after that order is issued. In Leeman v. PUC, 104 F. Supp. 553 (D.D.C. 1952), it was decided that a petition for reconsideration filed after a Phase II order could validly raise questions concerning decisions in a Phase I order. However, that case is not dispositive of the question raised here. It might be that that decision was based in some measure on the degree to which Phase I determinations are subsumed in a Phase II order.

In any event, we see no need to decide this question in passing on the petition before us. If we concluded that the petition was untimely we would deny it. At such time as it was timely, however, it would be refiled and we would have to consider it on its merits. Having now looked at those merits, we have concluded that the petition should be denied on the grounds outlined above. We see no reason why we should not so indicate at this time rather than determining whether we should wait to make our views known. The result in any event would be the same.

There is one further comment on timeliness, however, which we believe should be made. Mr. Goodman also purports to attack the interim increase granted by Order No. 5419. To the extent that his attack goes to issues discussed in granting interim relief which are subsumed in the Phase I order, we do not think that his attack is untimely. However, with respect to questions such as our power and our exercise of discretion in granting relief on an interim basis, we think that Order No. 5419 was a final order and reconsideration of those issues would not be timely. We do not view this as an acute problem, however, since Mr. Goodman did not raise questions of this nature in his petition.

7. Conclusion

We have carefully considered all of the points raised by Mr. Goodman in his Petition for Reconsideration. We are frank to say that we think that questions such as those he raises should best be presented for consideration in the course of the hearings. We provided ample opportunity for comment both by parties and by those persons who could not take time to participate as parties. Unfortunately, for reasons best known to himself, Mr. Goodman did not take advantage of those opportunities. That, of course, is his right and we have given his arguments very careful consideration despite their timing. We conclude, for the reasons stated above, that his contentions are without merit. For the most part, they are contrary to well-established and carefully conceived principles of regulatory law. They would have us depart from the reasoned and rational analysis of the facts of record and delve into conjecture and surmise. We decline to follow that course.

II

Pepco Application

The Pepco application seeks reconsideration of Section 4 of Order No. 5429. That Section required Pepco to "... establish an affirmative action program for equal employment opportunity ..." Appendix A to the order provided the Company with the criteria the Commission believed should be met in such a program.

Pepco assigned in its application seven errors which the Commission allegedly committed in Section 4 and Appendix A of its order. The Commission believes that each of the points urged by the Company has been adequately covered in its Order No. 5429 and need not be reiterated in this opinion and order. We will state again, however, the rationale of our action in this matter.

The equal employment issue having been raised by certain of the intervenors in the case and testimony having been introduced which stands uncontradicted in the record, some action was called for by the Commission. It is quite clear that the Company accorded this issue the most cavalier treatment and, while on notice of this Commission's concern in this area, did not move affirmatively to refute the presumptions raised by the record.

Indeed, in our interim findings in this case, Order No. 5419, dated January 30, 1970, we stated:

> "There is, first, the question of Pepco's employment practices. Suffice it to say that the testimony of record with respect to those practices is deeply disturbing to the Commission and although we are not persuaded that the evidence of record, considered in the context of a rate case, would support exercise of our authority to deny any rate increase, the issue of employment practices will be the subject of a full treatment and the fullest exercise of the Commission's authority in its final order of this phase of the proceeding."

Clearly, the Company could not have been in doubt that we intended to take some action in regard to its employment practices. Even without this clear pronouncement on our part, it was incumbent upon the Company, if it was not pleading confession and avoidance, to present some rebuttal testimony to change the condition of the record as it was before us for decision.

The Company has alleged that we made no findings of fact and

reached no conclusions of law, and that in fact they have not been found in violation by the Equal Employment Opportunity Commission or any other agency. They misconstrue our authority and duty under Title 43, Section 303 of the D.C. Code. In our order we found on page 41:

> "Specifically, we find that the statistics set out on Pepco's Form EEO-1 as of December 31, 1968, offered in evidence by the Urban League, provide a sufficient basis to require Pepco to modify its employment practices ..."

And, additionally, at page 42:

> "We have concluded, then, that we have the power to act and that the evidence of record justifies action. We now turn to what should be done."

In this posture we would have been remiss had we not ordered the company to correct its employment practices. For us to have awaited citation of the company by another agency would have been to shirk our responsibility.

Finally, Pepco points out that no hearings have been held on the specific provisions of the Affirmative Action Plan. If any problems develop with regard to the specifics of the Plan, Pepco can seek a hearing on those issues by filing appropriate pleadings with the Commission. We do not regard it as error that such hearings were not held prior to promulgation of the Plan.

For these reasons, therefore, the Application for Reconsideration filed by Pepco will be denied.

III

Union Application

The Electric Utility Employees' Union's (EUEU) application also seeks reconsideration of Section 4 of Order No. 5429.

The Commission has reviewed this application. The union's arguments essentially parallel those urged by Pepco in its Petition for Reconsideration of the same order. We find no substantial grounds or allegations of error sufficient to require reconsideration.

IV

General Services Administration

GSA asks that we reconsider two aspects of Order No. 5429. First, they question our treatment of the income tax surcharge. Second, they ask that we accept the position urged by their witness on rate of return.

1. Income Tax Surcharge

GSA asks that we adjust the test year operating results to eliminate the full effect of the Federal Income Tax Surcharge on recorded results. GSA points out that the new rates will not become effective until after June 30, 1970. The surcharge will expire as of that date.

In our Order No. 5429 we used Federal Income Taxes per books and adjusted them for averaging of the Investment Tax Credit. We made no adjustment for the Federal Income Tax Surcharge during the test year. In our computation of the required increase in gross revenues we included a factor for the Federal Income Tax Surcharge at 2 1/2%, reflecting a 5% rate for one-half year. We did this to reflect in the future rates to be established as a result of this proceeding, the fact that the surcharge would probably be eliminated as of June 30, 1970. Since the change in the law occurred subsequent to the preparation of the testimony and the record upon which we reached a decision, we did not adjust the test period for the potential tax law change.

GSA petitions that we should now adjust the test period to reflect the known facts concerning the surcharge.

We have concluded that the adjustment suggested by GSA should now be made. When the record in this proceeding was being developed, the ultimate fate of the income tax surcharge had not been finally determined. Therefore, the staff testimony did not suggest that the historical year income tax expense be adjusted to remove the effect of the surcharge. In considering the issues in Phase I, we proceeded on the basis of the evidence of record. Now, however, the question has been raised at a time when it is clear that the surcharge will, in fact, lapse as of June 30 of this year. If we take no account of this fact, the company's actual tax expense in the future period will have been overstated by a substantial sum. We believe that our obligation to the ratepayers requires us to take account of this fact at this time.

As a result, we have determined to adjust the authorized revenue increase by eliminating from the test period expenses $933,326, representing the Federal Income Tax Surcharge recorded on the books of the company during the test period.5/ The result of this adjustment is to increase the net operating income as adjusted from $50,155,962 6/ to $51,089,288. Having previously found a fair and reasonable rate of return to be in a range between 7.1% and 7.5% on a rate base of $854,341,390, and that a net operating income of $60,743,673 was required, we now find that an increase in net operating income of $9,654,385 is required. Applying a tax factor of 49.04 which reflects no Federal Income Tax Surcharge, the gross revenue increase required is $19,686,756 or 11.24% of existing revenue. The District of Columbia portion of this amount is 46.24% or $9,103,156.

In Phase II of Formal Case No. 541 we explored the theories and methods of the new schedules proposed by Pepco to raise the revenues required by our Order No. 5429. The action we have taken here regarding the income tax surcharge simply changes the total dollars to be distributed among the various categories of customers. We shall direct the company to present rate schedules following the same theories, methods, and allocations as those used in the Phase II proceeding adjusted to arrive at a $9,103,156 revenue increase.

Based upon the above discussion the findings in Order No. 5429 should be adjusted as follows:

Finding No. 2 - The adjusted net operating income for the year ended June 30, 1969 was $51,089,288.

Finding No. 3 - The rate of return on applicant's level of earnings for the test period is 6.39%.

Finding No. 7 - The applicant must increase its system-wide net operating income by $9,654,385, which with allowance for taxes amounts to an increase of approximately $19,686,756 in system-wide gross operating revenue.

Finding No. 9 - District of Columbia customers should provide approximately 46.24% of the total required increase of $19,686,756.

Finding No. 10 - Thus, the permanent rate adjustments should provide an increase in revenues from District of Columbia customers of $9,103,156; this amount including the increased revenues already being produced by the 5% interim surcharge ordered in Order No. 5419.

5/ A similar adjustment was made by the Maryland PSC in its opinion pp. 41-42 in Case No. 6258 "In the Matter of Application of Potomac Electric Power Company for an increase in its rates for retail electric service."

6/ Page 8 of Order No. 5429.

Order No. 5434, page 16.

2. Rate of Return

We discussed CSA's evidence on rate of return at considerable length in Order No. 5429. See pp. 21-22, 23-25. We, therefore, deny the petition for reconsideration of that issue for the reasons set forth in our earlier Order.

THEREFORE, IT IS ORDERED:

Section 1. That the Petition for Reconsideration of Leonard S. Goodman, filed May 14, 1970, be, and it is hereby, denied.

Section 2. That the Potomac Electric Power Company Application for Reconsideration of Section 4 of Order No. 5429 and Motion to Institute Separate Proceeding With Respect Thereto, filed May 15, 1970, be, and it is hereby, denied.

Section 3. That the Electric Utility Employees' Union Application for Reconsideration of Section 4 of Order No. 5429, filed May 15, 1970, be, and it is hereby, denied.

Section 4. That the Petition for Reconsideration of Robert L. Kunzig, Administrator of General Services, on behalf of the United States, filed May 14, 1970, be, and it is hereby, (1) granted with respect to the issue of treatment of the federal income tax surcharge in Order No. 5429, and (2) denied in all other respects.

Section 5. That the findings set forth in Order No. 5429 be, and they are hereby, modified as set forth above.

Section 6. That the Potomac Electric Power Company be, and it is hereby, directed to submit to this Commission by Friday, June 19, 1970, rate schedules which are

(1) prepared in accordance with the theories, methods, and allocations relied on by it in preparing the schedules previously filed by it in accordance with Order No. 5429;

(2) in the case of residential rates, consistent with the standards set forth at page 2277 of the transcript of hearing concerning adjustments of rates within the various blocks of usage, provided, however, that the increase in the blocks there referred to shall not exceed the adjusted total increase of 11.24%; and

(3) designed to increase its gross operating revenues within the District of Columbia on an annual basis by $9,103,156 from the level in the test year in accordance with the findings and conclusions in Order No. 5429, as amended by this Order.

Order No. 5434, page 18.

Section 7. That copies of the proposed rate schedules required by Section 6 hereof be served upon the parties of record in this proceeding at the time of filing with this Commission.

By the Commission:

George A. Avery
Chairman

A TRUE COPY:

Chief Clerk

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 5436

June 29, 1970

IN THE MATTER OF)
)
Application of POTOMAC ELECTRIC)
POWER COMPANY for an increase in) Formal Case No. 541
rates for retail electric service.)

I

On April 15, 1970, we issued our Order No. 5429 in this proceeding. This was the so-called "Phase I" Order in which we determined the amount of revenue increase required by the Potomac Electric Power Company ("Pepco" or "Company"). In that Order we directed the Company to file proposed rate schedules which would produce the revenue increase authorized and written testimony in support thereof. This Pepco did, and on May 25 and 26, 1970, we held hearings on the Pepco rate proposal. Testimony was presented on behalf of the Company by Mr. Frank Walters, Manager of Commercial Operations. We also heard testimony from Mr. Paul D. Kagen, the Commission's Chief Accountant, from Mr. George W. Ball on behalf of Safeway Stores, Inc., and from four consumer witnesses called by the D. C. City-Wide Consumer Council, namely, Mrs. Martha Pettus, Mrs. Ethelene White, Mr. Connie Drumgold and Mrs. Vivian Smith. At the conclusion of testimony, oral argument was heard from all parties desiring to present it.

Two revisions in the rates first proposed by the Company were filed following the hearings. The first resulted from a request made by Commissioner Porter at the hearing. Noting that the rate schedules filed by the Company proposed increases for residential customers with low levels of usage which exceeded the overall percentage of increase authorized by the Commission, Commissioner Porter asked the Company to file a revision which confined the increases in these low residential usage levels to a percentage figure which would not exceed the overall increase authorized. New Residential Schedules meeting this standard were filed by the Company on June 5, 1970.

On June 12, 1970, we issued our Order No. 5434 in which we acted upon petitions for reconsiderations filed by various persons. Among them was a petition filed by the General Services Administration in which they suggested that our treatment of income tax expense required revision in light of the expiration of the Federal income tax surcharge. We found merit in GSA's contention and, accordingly, reduced the required revenue increase from $10,220,788 to $9,103,156. The Company was directed to file revised rate schedules which would produce this amount of additional revenue. We directed the Company, in preparing these revised rate schedules, first, to ensure that they were in accordance with the theories, methods and allocations relied upon in preparing the schedules which the Company had filed in accordance with Order No. 5429 and second, to propose residential rates which meet the standards outlined by Commissioner Porter at the hearing, as discussed above. Rate schedules meeting these directions were filed by the Company in furtherance of the objectives set out in our Phase I Order. Subject to the modifications hereinafter ordered we find these rate schedules to be just, reasonable, and non-discriminatory.

II

A. Allocation of Revenue

The Company constructed its rate schedules by first deducting increases directly assigned to the servicing of street lighting and traffic signaling equipment and to outdoor lighting respectively. After additional adjustment for revenues derived from the fuel adjustment clause, the balance of the required increase was allocated among the various classes of customers represented by separate rate schedules. These include residential, low voltage commercial, and high voltage commercial. The allocations were based upon a formula which gave a 50% weighting to the kilowatt-hours sold to each category of customer and a 50% weighting to the revenues produced from each category. The formula employed in making this allocation is the same as that used by the Company in rate cases since 1955. It was approved by the Commission in the 1955 and 1958 rate proceedings. See Orders Nos. 4182, 4184, and 4525. It recognizes and takes into account the conflicting interests of the various kinds of customers, i.e., the residential user, who uses a small amount of electricity and pays a higher unit price for it, and the large power user, who uses large quantities of electricity and pays a lower unit price. We believe that the formula gives fair recognition to the various interests involved. Indeed, no serious question on this was raised during the hearings. We will follow past Commission precedent and approve this allocation formula.

B. Residential Rates

We find that the residential rates proposed by the Company in its latest filing -- that of June 19, 1970 -- are both just, reasonable and non-discriminatory and consistent with the objectives laid out in our Phase I Order. There are certain questions relating to these residential rates, however, which require discussion.

First, they do meet the standards outlined by Commissioner Porter at the hearings. He expressed the concern felt by the Commission that the impact of the rate increase on the low income, low usage customer should be kept as minimal as possible.

In response to this expressed concern, the Company has submitted a schedule of residential rates designed to raise only $1,987,758 of the $9,103,156 total revenue to be raised. This schedule is designed to assure that no residential customer using 300 kilowatt-hours of electricity or less will bear more than an 11.24% increase in his electric bill. We believe that keeping the increase for these customers at a level no higher than the overall increase authorized is a proper rate-making objective and we approve this aspect of these rates.

The Residential Schedule, as submitted, reduces the minimum bill kilowatt-hours from 35.7 to 30 but leaves the $1.50 cost the same. This change accords with the current minimum bill cost and kilowatt-hours in jurisdictions comparable to the District of Columbia.

Some concern was expressed at the hearing that the reduction in the number of kilowatt-hours available for the minimum bill charge would have an adverse impact on the low-income category of customers. However, the evidence indicates that this is not the case. The usage provided for the minimum charge, while at a low level, is generally less than that used by customers in the low-income category. A study of usage in low-income areas indicates that average usage in such areas is between 200 and 300 kilowatt-hours per month. It would appear then that the minimum bill is not a phenomenon found in low-income areas but rather a situation which occurs for a variety of reasons, e.g., vacancies, trips away from home, etc. We do not believe that the reduction in the kilowatt-hours available for the minimum charge will work any special hardship on low-income groups.

The Company proposes in these rate schedules to have, for the first time in its history, a higher rate for usage in the summertime than is charged in the winter. Under the proposal, usage in excess

of 800 kilowatt-hours would bear a rate of 1.90¢ per kilowatt-hour in the months of June through October and 1.20¢ per kilowatt-hour in the months of November through May. We believe that the innovation is justified. The record in this proceeding demonstrates that the Company must have additional revenue to meet the financial requirements imposed by the growth in demand being experienced by the Company and its consequent necessity for increased capacity. The increase in capacity is substantially related to the growth in peak demand. This peak occurs in the summer period and unquestionably is related to the heavy use of air-conditioning in Pepco's service area. We believe that the added costs involved in meeting this peak demand can legitimately be recognized by the charging of higher rates for higher levels of summer usage.

The Company has proposed to include in all its rate schedules other than the first 300 kilowatt-hours of the Residential Schedule, an adjustment for the changes in the cost of fuel. All of the current schedules except the Residential Schedule, the first 6,000 kilowatt-hours of the General Service Schedule, and the Temporary Schedule, have such a provision. Pepco proposes to extend this adjustment to all schedules.

If we were to accept Pepco's proposal, we would effectively remove any incentive on the part of Pepco for obtaining the best possible price for fuel, since under this proposal it would recover, through rates, the entire cost of fuel regardless of the price. We are not here saying that Pepco as a public utility would violate its public trust and deliberately overpay for fuel, but rather we point out that there would be no pressure on the Company to keep its fuel costs down. Generally, it is not appropriate to adjust one factor of expense without adjusting all factors. In this proceeding it was pointed out that while the cost of fuel per kilowatt-hour was increasing, Pepco's cost of labor per kilowatt-hour has been declining. These offsetting cost trends raise further doubt as to the propriety of having any fuel adjustment clause in the rate schedules.

Fuel adjustment clauses are generally included in rate schedules when it can be shown that fuel costs fluctuate widely and represent the predominant cost of electricity as delivered to the customer. In these cases, we believe it is proper to allow Pepco to adjust its energy charge for electricity to reflect changes in the price of fuel. Fuel cost for large power and wholesale customers represents approximately 2/3 of the total operating expense required to serve these users. For residential customers, the cost of fuel is only 1/3 of the total operating expense. The large disparity between the effect of changes in the price of fuel on the total operating expense attributable to the various rate schedules leads us to the conclusion that with regard to the Residential Rate Schedule,

fuel is not large enough in relation to total cost to warrant the additional complexity involved in applying any fuel adjustment clause to the residential bills. The public interest requires that a public utility's residential rate structure be as simple as possible so that the consumer can readily compute his bill from the monthly statement and the rate schedule itself without reference to additional factors and clauses. We will, therefore, delete the fuel adjustment clause from the Residential Schedule. (See p. 8 , infra, for a further discussion of the fuel clause proposed by the Company as applied to categories other than the residential customer.)

Representatives of the Washington Gas Light Company raised certain questions about the Company's proposed rates for water heating. The block to which the water heating rate applies was increased from 450 kilowatt-hours to 500 kilowatt-hours and the rate was made available for heaters which impose a load up to 7.5 kilowatts rather than the earlier restriction of 5 kilowatts. The testimony shows that the increase in the block length is consistent with the actual usage for water heating. The increase in permissible load is in line with the types of electric water heating equipment being provided by manufacturers. For these reasons we find no objection to these aspects of the water heating rates and will approve them as proposed.

One final point with respect to residential rates requires discussion. The D. C. City-Wide Consumer Council suggested in the Phase II hearings that no increase whatever be required of residential customers who have an income of less than $5,500 for a family of four persons and those who are receiving welfare payments, social security or unemployment compensation. It was suggested that such persons could ill-afford to pay any more for an essential service such as electricity and that they should not have any additional burden imposed upon them. We have carefully considered the proposal made by the Consumer Council and have concluded that it is not one which we can adopt. The suggestion faces insurmountable obstacles of both a legal and a practical nature.

From the legal point of view, we are required by the statute to establish rates which are not unjustly discriminatory. The net result of the Consumer Council proposal is that persons with incomes higher than $5,500 per year would be paying higher rates for the same service in order to avoid an increase for those in the lower income category. The premise on which the discrimination would be based is that persons with incomes lower than $5,500 per year cannot afford any further increase. However, it could well be that persons with incomes in excess of $5,500 per year would also feel, in some cases with great justification, that they cannot afford to pay more for electricity either. We think that the standards suggested, i.e.,

the ability of a customer to pay the increase, is too subjective and too indefinite to provide a sound basis on which to base an obvious rate discrimination.

We are aware of the burdens which increasing costs, particularly for essentials, impose upon low-income groups. However, we do not feel that we are empowered under the law to impose the solution to this problem which the Consumer Council suggests. We note in this connection that, while any increase is undoubtedly a burden for such persons, the increases involved here are of a very low magnitude. It appears from the data in the record that the increase for a low-income customer, assuming his usage levels are typical of the pattern for such persons, would amount to something less than one dollar per month. Again, we realize that that dollar could be quite important to someone struggling on a low income but it is not an insurmountable financial blow.

Turning to the practical difficulties involved in the Consumer Council's suggestion, it seems to us it would be largely unworkable. It would be difficult, if not impossible, to ascertain those customers who would fall into the proposed exempt category. Doing so would certainly impose a substantial additional cost burden on the Company. At the same time, such customers, while imposing this additional cost, would not be paying any additional rates. Even more difficult would be the problem of weeding out those persons who claim to fall into the exempt category but do not actually do so. Imposing this requirement upon the Company would be unrealistic and impractical.

Finally, although making this suggestion, the Consumer Council provided no evidence which would make institution of such a proposal possible. For instance, they themselves recognized that there was no data by which it could be determined how many persons would be exempt from an increase. Without such data it would be impossible to determine how much additional revenue would have to be sought from non-exempt customers.

For all these reasons, we see no basis on which we could grant the suggested change in the rate schedules proposed by the Consumer Council.

C. The General Service Schedule

We find that the so-called "GS" schedule as proposed by Pepco meets the statutory standard, being just, reasonable and not unjustly discriminatory. However, one improvement in the schedule was suggested at the hearings and we believe that it merits further consideration.

Safeway Stores, Inc., offered specific comments on the "GS" rate schedules proposed by Pepco. Through its utility rate expert, Mr. George W. Ball, Safeway proposed a modification of the "GS" schedule which would, in Mr. Ball's judgment, recognize high load factors without requiring customers to provide their own transformers. Under the Safeway proposal, the "GS" and "LP" schedules would be replaced by a single "GS" schedule, with slightly modified blocks to recognize high load factors, and with rates adjusted to compensate Pepco for transformer investment and carrying charges and to recognize transformer losses. Customers who desired to continue to provide their own transformers would be given a 10% discount.

Mr. Ball testified that his proposal would have no appreciable revenue effect insofar as Safeway was concerned, and although the opportunity to determine the revenue effect on other customers or on overall Pepco operations was not available to him, he would be surprised if more than a very limited number of customers would benefit from any substantial rate reduction.

Pepco's rate witness, Mr. Frank S. Walters, expressed cautious endorsement of Mr. Ball's recommendations as "very constructive" and "certainly not at variance with our general rate planning." Mr. Walters indicated, however, that since the "GS" schedule customers were Pepco's largest revenue producers, Pepco would want to subject Mr. Ball's proposal to a careful revenue analysis.

We also believe that Mr. Ball's suggestions appear constructive. While we recognize the need for analysis of the proposed single "GS" schedule to determine its revenue impact on Pepco, we are disinclined to accept a leisurely approach to this matter. We will adopt Mr. Walters' estimate that a thorough job might be done in approximately six months, and we will therefore, direct Pepco to conduct the necessary studies and report the results, together with such tentative revised schedules as may be appropriate, to the Commission on or before January 1, 1971. In the meantime, we will authorize Pepco's proposed schedule to be put into effect.

D. The Tariffs for Servicing of Street Lighting and Traffic Signaling Equipment

Among other increases proposed by Pepco was one of $667,314 in the annual bill to the District of Columbia Department of Highways and Traffic for servicing of street lighting and traffic signal equipment. Existing charges for this service, which are in addition to charges for the electric energy furnished for street lighting and traffic signaling purposes, were analyzed by Pepco and found to produce a little less than two percent rate of return. Upward adjustment was clearly warranted and indeed required. According to Mr. Walters, to

bring the return from this service up to the overall rate of return authorized by us in our Phase I Order would have required an increase of approximately $2,000,000. Pepco did not seek an increase of this magnitude, however, because of its belief, confirmed by the responsible officials of the D.C. Government, that there exists a need for a complete review and analysis of the services performed by Pepco and an agreement between Pepco and the D. C. Government as to the precise nature and extent of the responsibilities of each party.

The Commission was given the benefit of several alternative recommendations for disposal of this matter, including establishment of the proposed increase as an interim rate, subject to upward or downward revision from its effective date in accordance with subsequent agreement of the parties. Since this increase is a portion of the total revenue increase allowed in our Phase I Order, however, any retroactive adjustment in this item (assuming, but not deciding, that approval of such an arrangement would be within our authority) would affect the amount of the increases proposed for all other classes of service. We are persuaded that to introduce such uncertainty into this proceeding would be extremely undesirable. To temporize and retroactively adjust rates for only one class of service would be clearly discriminatory.

We are well aware, however, of the need for clarification of the duties and responsibilities of both Pepco and the D. C. Government in the area of street lighting and traffic signal servicing. Our staff has previously been involved in the development and growth of this service, and we shall direct the staff to immediately convene such informal conferences and arrange for the making of such studies as may be necessary to achieve prompt and satisfactory resolution of the current problem areas.

On this record, the $667,314 increase proposed by Pepco is clearly justified, and we will permit it to become effective on the same date as the other rate adjustments authorized herein. We will require Pepco, however, to file the new rates for this service with an expiration date of March 31, 1971, unless sooner terminated or cancelled, and we urge the concerned parties to make every effort to arrive at an understanding of the services to be performed well in advance of that date, in order that the Commission may have adequate time for review of any proposals for rate adjustments.

E. Efficiency Factor of the Fuel Adjustment Clause

Like existing clauses, the fuel adjustment clauses in the rate schedules proposed by Pepco give no recognition to changes in system efficiency from the time the adjustment factor is calculated until

the factor is recalculated at some future point in time. In the past, this factor has only been recalculated in connection with a general adjustment of rates. Today's technology requires a more prompt reaction to changes in generating efficiency. Pepco is in the midst of a large construction program involving several major generating stations which will be more efficient in the production of electricity than the system average. The presence of new and more efficient generating equipment dictates that the older, less efficient equipment be used fewer hours, thereby increasing the overall system generating efficiency. In order to reflect this change in the generating efficiency, we will require the Company to recalculate the efficiency factor each six months and apply it to customer bills where applicable.

III

CONCLUSION

Summarizing briefly, we have found that the allocation of required revenue increase among the various categories of customers is satisfactory. We have directed that certain changes be made in the residential rate schedule as originally proposed and have further directed that the fuel clause be eliminated from that rate schedule. We have directed that change be made in the fuel clause as applies to other rate schedules. We have directed that certain studies be undertaken with respect to the "GS" rate schedule and those schedules which affect the servicing of street lighting and traffic signaling. With these changes, the rates as proposed by the Company accomplish the objectives we set out in Orders Nos. 5429 and 5434, and are just, reasonable and non-discriminatory.

THEREFORE, IT IS ORDERED:

Section 1. That the schedules for electric service to be furnished by the Potomac Electric Power Company in the District of Columbia, set forth in the Appendix attached hereto, are hereby approved and shall become effective for electric service furnished to customers in the District of Columbia on and after July 1, 1970.

Section 2. That the Potomac Electric Power Company be, and it is hereby, directed to recalculate the efficiency factors of its fuel adjustment clauses as of January 1, 1971, and each six months thereafter. It shall file its calculations with the Commission no later than January 15 and July 15 of each year. If the calculations indicate that the efficiency factors have changed, Pepco shall concurrently file tariffs to reflect these changes.

Order No. 5436, page 10

Section 3. That the Potomac Electric Power Company be, and it is hereby, directed to undertake a study of the revenue effect of the modification of the General Service and Large Power Rate Schedules proposed by Safeway Stores, Inc., in this proceeding and to report the results of that study, together with such tentative revised schedules as may be appropriate, to the Commission on or before January 1, 1971.

Section 4. That Schedules DC-OH, DC-UG, and DC-TR in the attached Appendix shall have an expiration date of March 31, 1971.

A TRUE COPY:

By the Commission:

George A. Avery
Chairman

Chief Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24944

LEONARD S. GOODMAN,
Appellant

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, and POTOMAC ELECTRIC POWER COMPANY,
Appellees.

Brief for Appellant

On Appeal From the
United States District Court
For the District of Columbia

LEONARD S. GOODMAN

7119 16th St. N. W.

WASHINGTON, D. C. 20017

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CITATIONS

Cases

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ISSUE PRESENTED*

The single issue presented for decision by the Court is whether Order No. 5429 entered by the Public Service Commission on April 15, 1970, was a final order or decision of that Commission affecting the appellant Goodman.

REFERENCES TO RULINGS

The oral ruling of the District Court of October 7, 1970, is found at J.A. 25. The order appealed from dated December 11, 1970, is found at J.A. 14-16.

* This case has not come before the Court under the present or other title.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24944

LEONARD S. GOODMAN,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, and POTOMAC ELECTRIC POWER COMPANY,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This matter arose as an action pursuant to sections 43-704 through 43-710 of the District of Columbia Code to appeal and vacate a decision of the Public Service Commission of the District of Columbia (hereinafter Commission) directing that retail electric service rates in the District be increased by an overall 11.24 percent. The matter came before District Judge Pratt on October 7, 1970 on plaintiff's motion for summary judgment and defendants' motions to dismiss. On

December 11, 1970, without reaching the merits of the complaint, District Judge Pratt entered an order dismissing the complaint with prejudice (J.A. 14). Notice of appeal was filed on December 16, 1970 (J.A. 2).

The proceeding began before the Commission on the filing of an application by the Potomac Electric Power Company (herein Pepco or the company) on February 27, 1969, for permission under section 43-401 of the District of Columbia Code to increase its rates for electric service in the District of Columbia. Before hearings could be held on this application, the company filed an "Emergency Application for Interim Rates" in which it requested the immediate addition of a 6½% surcharge to existing rates.

The Commission consolidated the two applications for a prehearing conference. At this conference on August 25, 1969, Chairman Avery questioned the Commission's authority to grant "emergency or interim relief." Mr. Cornelius Means, counsel for the company, responded (Tr. 31):

> Now as to the authority of the Commission to grant emergency relief, I think that the Gas Company case, 1950, Judge Bazelon's opinion - -
>
> CHAIRMAN AVERY: That is the Baker case?
>
> MR. MEANS: Yes -- indicated that the Commission, I would say, probably

> has the power to grant the emergency relief.
>
> He said that it would be subject, of course, to certain things like the provision for a refund and that sort of thing, and meeting these other tests in there.

Mr. Means thereafter emphasized this last point by stating, "we presume. . . that any emergency relief that would be granted by this Commission would make provision for refund in the event it should come out that the final rates authorized were less than the emergency rates." (Tr. 33). He added (Tr. 35):

> the whole purpose of the emergency relief, I think, has to be -- you have to think of it -- in terms of its frame of reference that it is emergency relief on which you have a safety valve (a) that it is a very small amount; (b) that the refund provision will operate should you, in the end, prove to have gotten an excessive increase.

On this basis the Commission scheduled a hearing on the question whether an emergency existed (Tr. 76-77, 97). Such hearings were held on September 10 and 15, 1969.

On September 15, 1969, the Commission's chief accountant testified that the company had not answered the question whether its greater relative growth in Maryland, rather than in the District of Columbia, had caused the need for new distribution plants and capital investment (Tr. 196). Company counsel asked, "Wouldn't the fact that the rates, the interim rates are to be refundable take much of the sting or the problem away?"

The accountant responded: "Sure. But on the other hand, a dollar in hand today is worth more than a dollar which is possibly refundable six months from now. . ." (Tr. 196).[1]

Following these preliminary hearings, the Commission entered its "Interim Order" No. 5402 of October 27, 1969, deferring further action on the emergency application, and keeping such application under advisement, stating, "it is a situation in which both the existence and the degree of any emergency will be determined or influenced by the length of time required to complete hearings and render a decision on Pepco's basic application" (page 3).

All hearings were completed before the Commission by the end of December 1969. On January 30, 1970, the Commission entered Order No. 5419 authorizing the company to add a 5% surcharge to all electric bills in the District of Columbia on an interim basis pending final decision on its application for a permanent increase.

In Order No. 5419, the Commission concluded it would authorize "interim rate relief" or relief "on an interim basis" or "an interim increase" (J.A. 31). It said "we

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[1] Company counsel then asked: "Wouldn't you expect the Commission to require that the refunding be done with interest?" And the chief accountant responded: "Yes, I would." (Tr. 197).

do not find it necessary for the limited purpose of this order to make a final determination of a fair and reasonable rate of return for Pepco," nor "necessary to resolve" rate base and test year issues. (J.A. 28). It then discussed the staff presentation, suggesting alternative holdings, "if, on final decision, we were to accept the staff recommendation with respect to rate base and its minimum recommended rate of return. . ." (J.A. 29).

The Commission explained in Order No. 5419 that it tentatively believed "that Pepco's existing rates are insufficient, and therefore an increase in these rates must be authorized." It explained that such a holding is normally made in a socalled "Phase I" order in its proceedings, leaving only rate structure issues for a "Phase II" order (J.A. 29):

> In the ordinary course, such a conclusion would be followed, first, by an order setting forth detailed conclusions as to the proper rate of return, the rate base to which it should be applied, and the resulting revenue requirement. That order would be followed by further hearings on the appropriate changes in rates to produce the required additional revenues and the issuance of a second order detailing the specific rate changes. We believe that circumstances here presented warrant departure from that course of action.

The Commission stated in Order No. 5419 that it hoped to avoid an interim surcharge that "might, under our final decision, require refund." (J.A. 32); and repeated,

"Again, we wish to emphasize that we will discuss these subjects in detail in our Phase I order." (J.A. 33). The surcharge was permitted to become effective on February 2, 1970 (J.A. 35).

The Commission issued its Phase I order on April 15, 1970 in the form of Order No. 5429 containing its "Findings, Opinion and Order" (J.A. 38). In Order No. 5429, the Commission decided the test period to be used (J.A. 41-42); the amount of net operating income earned by the company in that period (J.A. 43-45); the rate base to which that income should be applied (J.A. 45-52); the needed rate of return (J.A. 53-67); the allocation of any increase among the jurisdictions served by the company (J.A. 72-75); and Pepco's alleged revenue requirement (J.A. 81). It concluded, "Pepco requires an increase in net operating income of $10,587,711," which after income taxes it thought "requires an increase of "22,103,781 in gross revenues" on a system basis of which District of Columbia customers should pay 46.24%. It noted that "the interim increase is already producing $4,083,026 of this amount from District of Columbia customers," and added: "The permanent rate adjustments for District of Columbia customers should produce that amount plus an additional $6,137,762." (J.A. 81).

At the same time, the Commission ordered that Pepco "be, and it is hereby, directed to submit. . .proposed schedules and written testimony in support thereof, designed to increase its gross operating revenues within the District of Columbia on an annual basis by $10,220,788 from the level in the test year in accordance with the findings and conclusions accompanying this Order." (J.A. 82). It further ordered that a hearing "on the implementation of this Opinion and Order, Phase II of this proceeding, be held on Monday, May 25, 1970. . ." (J.A. 83).

Appellant Leonard S. Goodman filed a petition for reconsideration of Order No. 5429 with the Commission on May 14, 1970.[2/] The petition urged the Commission to reverse its decision granting Pepco an increase on the grounds it had erred in Order No. 5429 when it,

1. Required the ratepayers to pay a return on large amounts of future investment without considering the earnings that would flow from that investment;

2. Arbitrarily increased the rate base for supposed effects of inflation;

3. Provided an excessive increase in the rates for federal income taxes; and

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[2/] The petition is also in the record before the Court as Attachment No. 5 to the complaint (Record Doc. No. 1).

4. Allocated an excessive percentage of the alleged need for an increase to the District of Columbia.

Pepco responded to the petition for reconsideration by arguing only that Order No. 5429 was not a final order or decision of the Commission; but that it was "interlocutory in nature" and did "not constitute a final order which can be the subject of an application or petition for reconsideration under section 43-704 of the Code or of an appeal to the District Court under section 43-705 of the Code," citing Leeman v. Public Utilities Commission, 104 F.Supp. 553, 556 (D.D.C. 1952). 3/

The Commission rejected the company's position, accepted the petition for reconsideration for filing, and denied the petition on its merits in Order No. 5434 of June 12, 1970 (J.A. 84). It said that if it denied the petition as untimely,

> it would be refiled and we would have to consider it on its merits. Having now looked at those merits, we have concluded that the petition should be denied on the grounds outlined above. We see no reason why we should wait to make our views known. The result in any event would be the same. (J.A. 94).

The Commission added that to the extent that Mr. Goodman's attack on Order No. 5419 granting the interim increase

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3/ "Pepco Statement with respect to the petitions for reconsideration filed by the Administrator of General Services and Leonard S. Goodman," served May 20, 1970, page 2.

"goes to issues discussed in granting interim relief which are subsumed in the Phase I order, we do not think that his attack is untimely." (ibid.).

The appellant Goodman filed his complaint for injunctive relief and petition of appeal in the District Court on June 15, 1970 (see J.A. 1). At the same time he filed a notice of appeal with the Commission pursuant to section 43-705 of the District of Columbia Code.

The Commission's Phase II hearing occurred on May 25 and 26, 1970. On June 29, 1970, it entered its Order No. 5436 on the Phase II issues (J.A. 102). In this order the Commission reviewed the allocation of the increase among the residential, low voltage commercial, and high voltage commercial classes of customers, and approved a schedule of rates implementing its prior decision.

In its answer to the complaint, the Commission now agreed with the company's position that Order 5429 was not a final order or decision and was not appealable (J.A. 11). Both the Commission and the company moved to dismiss the complaint on such grounds.[4/]

Following the hearing on the Goodman motion for summary judgment and the two motions to dismiss of the defendants, District Judge Pratt entered an order on

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[4/] The company's motion is reproduced at J.A. 9-10. For the Commission's motion, see Record Doc. No. 13.

December 11, 1970, dismissing the complaint (J.A. 14).[5] He held that no attack could be made in any way affecting the interim increase (J.A. 14-15); that Order No. 5429 was "neither a final order or decision nor an order or decision which affected the plaintiff" (J.A. 15); and that appellant Goodman was not affected by any order until the entry of Order No. 5436 which was not on appeal and could not properly be brought before the District Court. (J.A. 16). Appellant Goodman filed his notice of appeal on December 16, 1970 (J.A. 2) bringing the matter before this Court.

ARGUMENT

I.

ORDER NO. 5429 WAS A FINAL ORDER OR DECISION AUTHORIZING THE PERMANENT RETENTION OF THE INTERIM INCREASE AND CUTTING OFF RIGHTS OF REFUND OR RESTITUTION

Under the District of Columbia Code, the Commission must entertain petitions for reconsideration to its orders and decisions under the same standards permitting judicial review. Both sections 43-704 and 43-705 of the District of Columbia Code require a "final order or decision" and that the petitioner or complainant be "affected." When

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[5] For the initial ruling of the District Court immediately following the argument on the motions, see J.A. 25.

Pepco asked the Commission to reject appellant Goodman's petition for reconsideration of Order No. 5429, the Commission held that the petition was timely. It held that it was timely insofar as it "goes to issues discussed in granting interim relief which are subsumed in the Phase I order" (J.A. 94). The Commission simply reversed its own position in moving to dismiss the complaint, for on motion it argued that appellant's complaint, under the same standards applicable to his petition, was now not timely.

In granting interim relief, the Commission had expressly put off decision on all aspects of the merits of the increase on the grounds suggested by Pepco that a refund could be granted if the increase was later found to be excessive. Thus, it did not find it necessary in Order No. 5419 to decide questions relating to rate base and rate of return or the appropriate allocation of the increase to Pepco's District of Columbia customers. All such questions were deferred to its "final decision," and left to be "subsumed in the Phase I order."

As the Commission suggested in accepting appellant's petition for reconsideration, Order No. 5419 remained open to revision and possible refunds until the entry of Order No. 5429. The interim order was entered only on the basis of the company's emergency application; the interim relief

was thereafter subject to revision and refund until the Commission had reached a final decision regarding the company's need for revenue. As Judge Wright stated in Moss v. Civil Aeronautics Board, ___ U.S.App.D.C. ___, 430 F.2d 891, 901 (1970). "Any approval of rates under such conditions would be subject to revision once more complete information is obtained."

In Order No. 5429, the Commission made its final decision regarding each of the issues it had deferred in Order No. 5419; in opting for an increase greater than the 5% interim one, it cut off all right to refund or restitution of the interim increase. Order No. 5429, therefore, was a final order or decision that affected appellant Goodman and hundreds of thousands of other consumers of electricity in the District of Columbia.

II.

ORDER NO. 5429 AS AMENDED ON RECONSIDERATION WAS A FINAL DECISION OF THE COMMISSION ON THE MERITS OF THE RATE INCREASE

The District Court dismissed the complaint solely on the grounds the petition for reconsideration and the appeal should have been directed to a later order of the Commission; rather than petition for reconsideration and appeal Order No. 5429, in the view of the District Court, the appellant should have sought reconsideration and have appealed Order No. 5436. In denying appellant Goodman's petition for

reconsideration on its merits, however, the Commission had said that if the petition had been presented at a later date the Commission would have reached the same decision. If it waited for the petition to be refiled, "the result in any event would be the same" (J.A. 94). The District Court would have required appellant Goodman to have performed a completely useless task. The Commission had already held that it was unnecessary to direct a petition for reconsideration of the merits of the increase to any order subsequent to Order No. 5429.

Since the Commission said in its order denying appellant Goodman's petition for reconsideration that any further petition would receive the same treatment, there was nothing further for the Commission to do, and, therefore, it had entered its final decision on the merits of the increase. As the Supreme Court stated this term in Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 39 L.W. 4007, decided December 8, 1970,

> the relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.

Like that case, here "there was no possible disruption of the administrative process; there was nothing else for the Commission to do. And certainly the Commission's action

was expected to and did have legal consequences." (39 L.W. at 4009-10).

The following legal consequences, in addition to those discussed in Point I, supra, flowed from Order No. 5429 (as amended in Order No. 5434):

> 1. The Commission decided with finality each of the substantive issues relating to the merits of the increase; and
>
> 2. the Commission directed (see J.A. 82) Pepco to file schedules reflecting its decision on the merits of the increase.

When the District Court held that Order No. 5429 was merely "interlocutory in character" (J.A. 15), we submit the characterization had "the hollow ring of another era" (see 39 L.W. at 4009).

Of course, "administrative orders of a merely preliminary or procedural character are not directly and immediately reviewable." However, "That does not mean that judicial review must necessarily await the ultimate order finally terminating the underlying proceeding; but the order to be reviewable must be administrative action of a substantial character approaching some degree of finality." Algonquin Gas Transmission Co. v. Federal Power Commission, 201 F.2d 334, 337 (1st Cir. 1953).

Moreover, section 43-705 flatly states that appeal may be taken from either a final order or a final decision of the Commission.

Order No. 5429, as amended, is a decision reviewable in court as a "final decision" since it falls within the class of decisions which are of a "definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938).

The District Court appears to have thought that only the Phase II order was appealable. But Order No. 5436 involved merely the "implementation" (J.A. 83) of the increase earlier decided with finality. Phase II concerned only the prevention of discrimination among the various classes of Pepco's customers. Appellant Goodman's complaint in the District Court (J.A. 3-9) raised no issue regarding Pepco's rate structure or any discrimination among classes of customers. Order No. 5436, therefore, in deciding these rate structure questions was irrelevant to the complaint.

The ruling below is in direct conflict with the decision of this Court in Washington Gas Light Co. v. Baker, 88 U.S.App.D.C. 115, 188 F.2d 11, 17 (1950), cert. denied

340 U.S. 952. The Court of Appeals held in Baker that a rate decision reached after a "statutory 'full rate hearing'" is subject to plenary judicial review, whether or not new tariffs have been authorized. As the Court of Appeals stated, "whether or not the rate schedules . . .discriminate between. . .users" need not be reached in deciding upon the company's need for an increase (188 F.2d at 23).

Phase I concerned the rates as a whole, a matter entirely separate from the relation of individual rates to each other. The holding in Baker, therefore, is fully consistent with the settled rule that a complaint may attack the overall profit level without attacking individual rates of a utility. As the Supreme Court stated many years ago, "If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair." Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 483 (1924). The complaint asked the District Court to do just that -- to require the Commission to reduce the company's overall profit level to a fair one.

The District Court relied on the late Judge Holtzoff's ruling in Leeman v. Public Utilities Commission, 104 F.Supp. 553, rev'd on other grounds, 93 U.S.App.D.C. 194, 213 F.2d

176 (1954), cert. denied 348 U.S. 816, that an appeal of an order like Order No. 5436 could bring up the merits of the rate increase. Such a ruling is not inconsistent with allowing an appeal prior to the entry of Order No. 5436. However, in a dictum, Judge Holtzoff also characterized an order similar to Order 5429 as "interlocutory"; that statement did not consider any interim increase, which was not involved in that case, nor was the statement presented for review on the subsequent appeal to this Court. In any event, the better rule is that a general revenue order is subject to judicial review. Moss v. Civil Aeronautics Board, ___ U.S.App.D.C. ___, 430 F.2d 891, 898-99 note 32 (1970); Electronic Industries Association v. United States, 310 F.Supp. 1286 (D.D.C. 1970); Alabama Power Company v. United States, 316 F.Supp. 337 (D.D.C. 1970) (dissent of Circuit Judge Wright).[6]

Since appellant Goodman is a consumer of electricity (J.A. 9, 26) who was "threatened with financial loss by a Commission order, which fixes prices and prevents competition. . . /he/ is also a person aggrieved," and is

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[6] The majority in Alabama Power held that a shipper must appeal the order establishing his individual rates; it was affirmed by an equally divided Supreme Court. That rule of course would not apply, where as here, (1) there is no statutory right to reparation (see Moss, 430 F.2d at 898-99); and (2) all Pepco's rates are prescribed and there are no utility-made rates comparable to "carrier made" rates of railroads. (see District of Columbia Code, section 43-401; and Moss, supra).

entitled to appeal that order. See Associated Industries v. Ickes, 134 F.2d 694, 705 (2d Cir. 1943). Consumers of electricity are persons affected or aggrieved within the meaning of the District of Columbia Code, section 43-705. United States v. Public Utilities Commission, 80 U.S.App.D.C. 227, 231, 151 F.2d 609, 613 (1945); and see Bebchick v. Public Utilities Commission, 109 U.S.App.D.C. 298, 287 F.2d 337 (1961).

CONCLUSION

For the foregoing reasons, the appellant Leonard S. Goodman requests the Court to reverse the order of the District Court of December 11, 1970, remand the matter to it for a decision on the merits of the complaint and petition of appeal, and award all costs of this appeal.

LEONARD S. GOODMAN

7119 Sixteenth Street, N.W.
Washington, D.C. 20012

BRIEF FOR APPELLEE PUBLIC SERVICE COMMISSION

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 24,944

LEONARD S. GOODMAN,

Appellant,

V.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

And

POTOMAC ELECTRIC POWER COMPANY

Appellees.

Appeal From The United States District Court
For The District Of Columbia

C. FRANCIS MURPHY,
Acting Corporation Counsel, D.C.

GEORGE F. DONNELLA,
Assistant Corporation Counsel

C. BELDEN WHITE, II,
Assistant Corporation Counsel

Attorneys for Appellee
Public Service Commission
Room 341, District Building
Washington, D. C. 20004

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SUBJECT INDEX

CASES CITED

STATUTES CITED

ISSUE PRESENTED*

When the Public Service Commission, in conformity with established practice in rate proceedings, conducted a Two Phase rate proceeding, the first phase establishing the amount of revenue necessary for the Electric Company to earn a fair return on that part of its investment used to provide electric service in the District of Columbia, and the second phase authorizing and prescribing a revised schedule of rates to produce such revenue found necessary in the first phase, the question is:

Did the District Court err in finding that Order No. 5429 entered in Phase I of the proceeding was not a final order or decision which affected the plaintiff when such order by its own terms required further public hearings on proposed rate schedules which could only become effective upon the entry of a final order of the Commission in Phase II, approving the rate schedules?

* This case has not been before this Court on any prior occasion.

BRIEF FOR APPELLEE PUBLIC SERVICE COMMISSION

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 24,944

LEONARD S. GOODMAN

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

and

POTOMAC ELECTRIC POWER COMPANY

Appellees.

Appeal From The United States District Court
For The District of Columbia

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court dismissing a complaint and petition of appeal brought by plaintiff appealing action taken by the Public Service Commission in its Formal Case No. 541 (J.A. 14). Briefly, the underlying facts are as follows:

On February 27, 1969, the Potomac Electric Power Company

(Company) filed with the Public Service Commission (PSC or Commission) an application for an increase in rates for the purpose of obtaining a Commission determination of the fair rate of return for the Company; the over-all revenue requirement to produce such a return; and finally, to have the Commission establish rate levels required to produce the approved revenue requirement. Prior to the time that hearings were held on the rate application, the Company filed an emergency application for interim rates requesting immediate rate relief by the addition of a 6 1/2 per cent surcharge on existing rates. The emergency application was held sub judice until further order of the Commission by its Interim Order No. 5402, dated October 27, 1969, and the two applications were thereafter consolidated for hearing.

In the hearings before the PSC there were a number of intervenors who participated, including the Administrator of General Services (GSA), acting on behalf of the executive agencies of the United States Government; Washington Gas Light Company; D. C. Citywide Consumer Council; the Washington Urban League; Arlington County Board of Virginia; Capital Group Ministry, Inc.; United Planning Organization; Consumer Council Change, Inc.; and Safeway Stores, Inc. There were eleven days of hearings on the Company's applications and one day devoted to oral argument after submission of briefs. Appellant (Goodman)

did not intervene or otherwise participate in the proceedings before the Commission.

At the conclusion of the hearings on Phase I, the Company renewed its emergency application seeking interim rate relief on an expedited basis and the Commission, on January 30, 1970, acted on the application by its Order No. 5419 permitting a 5 per cent surcharge on existing rates (J.A. 27-35).

On April 15, 1970, the Commission entered its Findings, Opinion and Order No. 5429 (J.A. 38, et seq.) and ordered the Company to submit proposed rate schedules to implement Order No. 5429 with written testimony in support of its proposed rates. On June 12, 1970, the Commission adjusted its treatment of the income tax surcharge by its Order No. 5434 (J.S. 84) but otherwise denied four petitions for reconsideration, including that of Goodman.

The Commission followed the usual procedure of holding a two-phase proceeding on the Company's application, i.e., it first determined, after full hearings, the revenue required by the Company to earn a fair return in Order No. 5429, as amended by a revision of a tax treatment in Order No. 5434 (upon GSA's petition for reconsideration, J.A. 97, 98) and directed the Company to submit proposed rate schedules to produce gross operating revenues on an annual basis in accordance with the findings and conclusions contained in Order No.

5429, as amended by Order No. 5434. On June 29, 1970, after further hearings, the Commission issued its Order No. 5436* approving the schedule of rates for electric service furnished by the Company within the District of Columbia. No person, including appellant Goodman, petitioned the Commission for reconsideration of its order setting rates for electric service in the District of Columbia. Immediately after the Commission entered its Order No. 5434 denying appellant Goodman's petition for reconsideration of Order No. 5429, Goodman filed a complaint and petition of appeal in the United States District Court for the District of Columbia (J.A. 3-9). Ultimately, the matter came before the Court upon the motions of Goodman and the Company for summary judgment and of the Commission to dismiss, and the Court, upon consideration of the record, the authorities cited by the parties and arguments of counsel in open court, dismissed the petition of appeal and accompanied its Order with a statement of reasons (J.A. 14-16, inclusive). On December 16, 1970, Goodman filed his notice of appeal from the order of the Court entered on December 11, 1970.

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* Notwithstanding the fact that there was no petition for reconsideration of Rate Order No. 5436, it was furnished to the District Court for its information in connection with the motions before it, and appears in Joint Appendix filed in this Court at Page 102, et seq.

APPLICABLE LAW AND SCOPE OF REVIEW

Sections 43-704 through 43-710, inclusive, D. C. Code, 1967, provide a comprehensive and exclusive method for the review of final orders and decisions of the Public Service Commission. Briefly, Section 43-704 provides for an application for reconsideration in writing by anyone affected by any final order or decision of the Commission. In pertinent part it provides:

> "**Any public utility or any other person or corporation affected by any final order or decision of the commission may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. **No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined. **"

Section 43-705 confers jurisdiction on the United States District Court for the District of Columbia to hear and determine any appeal from such final order or decision; further provides that the appeal shall be heard upon the record before the Commission and that upon the conclusion of the hearing thereon, the court shall either dismiss the appeal and affirm the order of the Commission or sustain the appeal and vacate the Commission's order. This section further confers jurisdiction upon the United States Court of Appeals for the District of Columbia Circuit

on appeal from the order or decree of the District Court. Thereafter, the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Section 43-706 provides that in the determination of any appeal from an order of the Commission, the review by the Court shall be limited to questions of law and that the findings of fact by the Commission shall be conclusive unless it shall appear that such findings are unreasonable, arbitrary or capricious.

Section 43-710 confines the method of review of the orders and decisions of the Commission exclusively to that provided by Sections 43-704 to 43-709, D. C. Code, 1967

ARGUMENT

I

Preliminary Statement With Respect To PSC Order No. 5419 Granting Interim Relief

Appellant Goodman in his brief has not directly raised as an issue presented in this case the District Court's treatment of Order No. 5419 (App. Br. 1). However, as the District Court stated (J.A. 14) and the Public Service Commission intimated (J.A. 94) Goodman has been something less than precise in informing the Commission and the Court (as well as the attorneys opposing his appeal) of the order or orders of the Commission he is appealing. Notwithstanding

that Goodman freely admitted the obvious fact that he had never filed a petition for reconsideration of Order No. 5419; and admitted that a consumer or user of electric energy was affected by Order No. 5419 on the effective date thereof (J.A. 23), his present argument appears to be based upon the theory that the Commission in Order No. 5419 granted a refundable increase in the form of a surcharge and this in some way obviated the necessity of complying with the statutory method governing review of Commission orders.

Let us examine his contention with reference to what he contends was a surcharge subject to refund in Order No. 5419. The order is reproduced in the Joint Appendix (J.A. 27-35, inclusive). Nowhere in that order does the Commission suggest or even intimate that the surcharge is subject to a subsequent refund. In fact, the Commission, after a review of the record, stated (J.A. 34):

> "**Finally, we have found that a 5 per cent surcharge on all existing rates will produce a rate of return of 6.8 per cent on a weighted June 30, 1969 rate base, a rate of return which cannot be regarded as excessive by any standard, but which should be adequate on an interim basis to permit PEPCo to implement its current financing program**"
> (Emphasis supplied)

Appellant Goodman completely ignores this statement and relies in its brief upon certain colloquy between counsel for the Company and the Commission and its staff (App. Br. 3-5) to support his theory that

the interim surcharge was subject to refund. He ignores the fact that the request for interim surcharge rate relief was based upon undisputed evidence of record as to the capital structure and increased cost of capital over that of prior proceedings, and that Company counsel was going no further than to ask that existing costs of debt and preferred stock be recognized together with a prior rate for equity which was undeniably lower than could be justified on the record made in the proceeding before the Commission. In such circumstances it is not strange that counsel for the Company was perfectly willing that interim rate relief of a minimum of 6 1/2 per cent be permitted subject to refund. Under the Company's theory there was no possibility on the evidence of record that such a refund could be made. It is equally clear from the Commission's analysis of the record why it ignored the proffer (if it can be so termed) of the Company to accept interim relief subject to refund, since in granting only a portion of the relief that the Company requested on an interim basis, it ascertained it was not asking any customer to pay more than could be justified by any reasonable standard (J.A. 31).

In light of these facts Goodman's tortured construction of Order No. 5419 has absolutely no validity. The Commission stated in denying Goodman's petition for reconsideration: "**with respect to questions such as our power and our exercise of discretion in granting relief on

an interim basis, we think that Order No. 5419 was a final order and reconsideration of those issues would not be timely." (J.A. 94) The District Court held that Order No. 5419 was a final order or decision of the Commission which affected the plaintiff because it disposed of the application of the Company for interim rate relief, effective February 2, 1970, without requiring any further order of the Commission. The court further correctly stated that Goodman's failure to file a petition for reconsideration in accord with statutory requirements for review effectively cut off any right of appeal he might have from this order.

Finally, appellant's apparent contention (App. Br. Pgs. 11-13) that Order No. 5419 granting interim relief was not ripe for review prior to issuance of Order No. 5429 is completely negated by one of the cases upon which he principally relies. In Moss v. Civil Aeronautics Board, ____U.S. App. D.C. ___, 430 F 2d 891, 901-2 (1970) this Court indicated that emergency action granting interim rates was subject to review, although such review would be relatively limited to the question of whether the conclusion to afford interim relief was reasonable and based upon substantial evidence. Order No. 5419 clearly satisfies this criteria, but as indicated, supra, and as the District Court found, Goodman failed to petition the Commission for

reconsideration of Order No. 5419 within the time or in the manner prescribed by law in order to perfect an appeal (J.A. 15).

II

Order No. 5429 Was Not A "Final" Order Of The Public Service Commission Which "Affected" Appellant

Having disposed of appellant's contentions with respect to his indirect attack on PSC Order No. 5419 granting interim rate relief to the Company, supra, and showing that the District Court correctly disposed of the matter insofar as it may have been an issue on appeal, we turn to Goodman's attack upon PSC Order No. 5429.

Order No. 5429 concluded that the Company's fair rate of return was in a range between 7.1 per cent and 7.5 per cent and utilized the lower end of the range (7.1 per cent) in connection with the rate base found, to ascertain the Company's future revenue requirements. In so doing, it directed the Company to submit proposed rate schedules and written testimony in support thereof, designed to increase the gross operating revenues of the Company within the District of Columbia in accordance with the findings and conclusions in Order No. 5429 (J.A. 82).

Section 43-705, D. C. Code, supra, provides in pertinent part that the United States District Court for the District of Columbia shall have jurisdiction to hear and determine any appeal from a final order or decision of the Commission.

The foregoing statutory provision vests the Court with jurisdiction to review only "final" orders or decisions of the Commission and then only upon appeal by one "affected" by such order. Neither of these prerequisites for review existed in this case, and it is therefore submitted that the subject matter of Goodman's appeal was beyond the jurisdiction of the Court.

Order No. 5429, as amended by Order No. 5434, supra, were not "final" orders within the meaning of the statute. Furthermore, these orders were unrelated to any present interest of the plaintiff.

An administrative order is not reviewable unless it denies a right as a consumation of the administrative process. Western Airlines, Inc. v. C.A.B., 184 F 2d 545. c.f., U. S. v. Los Angeles and S.L.R.R. Co., 273 U.S. 299, 310. The orders complained of did not deny any right to the plaintiff and were not the consumation of the administrative process, but were, rather, a step in that process. They commanded nothing of the plaintiff nor did they deny him anything. On their face, they were not presently enforceable, but awaited the accomplishment of that which they directed, i.e., the submission of a schedule of rates for the consideration of the Commission.

The Court has previously had before it the question of the application of the statute to a circumstance comparable to the situation here.

In Leeman v. P. U. C., 104 F Supp. 553, Leeman and others including Capital Transit and the United States, appealed from orders of the PUC increasing rates for electric power. In deciding the case, the Court stated at Page 556:

> "[4] Before entering on a discussion of the merits, a preliminary procedural matter should be mentioned. The applicable statute, in effect, provides that in order to be qualified to appeal from an order of the Commission, the party claiming to be aggrieved must make an application to the Commission for reconsideration within thirty days after the publication of its final order or decision. It is objected by the respondents that the United States of America is not entitled to be heard on appeal because of alleged failure to comply with this requirement. Admittedly the United States filed no petition for reconsideration within the thirty-day period after the promulgation of the first order of the Commission, that is Order No. 3762, dated February 12, 1951. Such a petition was filed by it, however, within thirty days after the making of the final order of the Commission, dated March 20, 1951. On preliminary motions to dismiss the appeal of the Government, this Court held that the United States satisfied the statutory provision, since the first order of the Commission was in effect an interlocutory order formulating merely the principles on which the new rate schedules should be prescribed, while the second order prescribing the actual rates should be regarded as the final order. The situation is similar to that of an interlocutory judgment of a court followed by a final judgment. An appeal from the final judgment brings up for review questions determined by the interlocutory decree. In the same manner in this case the final order prescribing the actual rates brings up for review the prior order, which formulated the principles on which the new rates should be based. **"

Clearly, under the statute and the holding quoted above, Order No. 5429, as amended by Order No. 5434 was interlocutory in nature

and merely formulated principles on which new rate schedules were to be prescribed. It is only the order prescribing the actual rates to be charged PEPCo customers within the District of Columbia which is "final" or could "affect" consumers within the purview of the statute.

Summarized, it was the Commission's position before the District Court that the statutory requirement that persons bringing an appeal be affected by a final order or decision of the Commission was no less jurisdictional than the prerequisite of an application for reconsideration before appeal (Sec. 43-704, D. C. Code, 1967) or the time limitation for filing an appeal set forth in Sec. 43-705, D. C. Code, 1967. These requirements are statutory and jurisdictional, not merely procedural, Lewis-Hall Iron Works v. Blair, 57 App. D.C. 364, 23 F 2d 972.

As noted, supra, no one applied for reconsideration of the final rate order in this proceeding and, as a consequence, an appeal does not lie (Sec. 43-704, D. C. Code, 1967).

Goodman, in argument, has gone a great deal further than could reasonably be expected or justified on the record in this case. Some indication of this may be found, supra, in appellee PSC's preliminary statement. In his comments upon the Commission's denial of his petition for reconsideration of Order No. 5429 (App. Br. P. 12), he would lead this court to believe, by inference at least, that the Com-

mission had decided that its Order No. 5429 was a final order and that in some manner after it denied appellant's petition for reconsideration, it changed its mind and proceeded on a different basis in the District Court. Nothing could be further from the truth. The Commission made it quite clear in Order No. 5434 (J. A. 84, 93, 94) that it was not deciding the question of timeliness. A fair summary of the Commission's position was that the several contentions made by Goodman were without merit and for the most part contrary to well-established and carefully conceived principles of regulatory law. That being the case, the Commission saw no reason it should not at that time advise Goodman of its conclusions on the merits of his contentions, since they would have been the same at any time. In any event the law is clearly settled tnat jurisdiction cannot be given to a court by consent, acquisence or inadvertance. The court's authority to inquire as to its own jurisdiction, particularly in a case such as this where jurisdiction is specifically conferred, precludes the idea that the Public Service Commission could confer jurisdiction even if appellant's allegation had any basis in fact, Woodmen of the World Life Insurance Ass'n. v. F. C. C., 69 App. D. C. 87, 99 F 2d 122; Royalty Service Corporation v. City of Los Angeles, 98 F 2d 551 (9th Cir.) and McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135.

A brief analysis of the two cases principally relied upon by Goodman demonstrate they lend no support to his arguments. In Moss v. C.A.B., supra, the CAB admitted that it had not complied with the statutory procedural requirements and criteria for rate-making in that it approved in advance the filing without suspension of airline tariffs providing for a 6 per cent increase in airline revenues (430 F 2d 891, Pg. 893). In deciding the case the court held that the tariffs filed by the carriers were unlawful in that they were based on a prior order of the Board which was invalid because the statutory procedural requirements for public notice and hearing were not observed (Page 902). As pointed out, supra, the court in that case indicated that interim rates could be granted and subjected to review under appropriate circumstances.

Washington Gas Light Company v. Baker, 88 App. D.C. 115, 188 F 2d 11 involved an action to set aside a rate increase granted by the PSC (Pg. 13). The District Court granted the relief requested and upon appeal to this court the order of the District Court was affirmed (Pg. 23), although for reasons materially different from those advanced by the District Court (Pg. 14). Clearly these cases involved rate orders and it was this aspect of the cases with which the courts dealt. Appellant cannot be completely unaware of this since he cites Bebchick, et al. v. P.U.C., et al., 109 U.S. App. D.C. 298, 287 F 2d 337, where he

was one of the parties appellant and this court there held it was "new fare schedules", i.e., increase in cash fare from 20c to 25c which "affected" transit riders (Pg. 339).

In view of all the circumstances, the District Court found in its "Statement of Reasons" that Order No. 5429 as amended by Order No. 5434 was not a final order or decision of the Commission nor an order or decision which affected the plaintiff. The court further found that said order was preliminary and interlocutory in character formulating the principles and setting the guidelines by which the Company was to prepare and submit the rate schedules to be subject of further public hearings and that plaintiff was not affected until the entry of rate Order No. 5436, dated June 29, 1970. This was the final order of the Commission approving rate schedules and ordering the same into effect. As noted above, Order No. 5436 was not, and could not, properly be brought before the court (J.A. 15-16) since no petition for reconsideration had been filed with respect to it. It is respectfully submitted that to have held otherwise would negate the entire purpose of the statutory plan of appeal which contemplate that only "final" order or decisions of the Commission are reviewable at the behest of one "affected".

CONCLUSION

For the reasons shown above, the order of the District Court dismissing Goodman's complaint and petition of appeal from orders of the Public Service Commission should be affirmed.

Respectfully submitted,

C. FRANCIS MURPHY,
Acting Corporation Counsel, D. C.

GEORGE F. DONNELLA,
Assistant Corporation Counsel

C. BELDEN WHITE, II,
Assistant Corporation Counsel

Attorneys for Appellee
Public Service Commission
Room 341, District Building
Washington, D. C. 20004

BRIEF FOR APPELLEE

Potomac Electric Power Company

United States Court of Appeals

For the District of Columbia

No. 24044

Lenore S. Goodman, Appellant,

v.

Public Service Commission of the District of Columbia, and
Potomac Electric Power Company, Appellees.

Appeal from the United States District Court for the
District of Columbia

Attorneys and Firms

[illegible]

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ISSUES PRESENTED

Two issues are presented for decision:

1. Whether an appeal from Order No. 5419, published by the Public Service Commission of the District of Columbia on January 30, 1970, was properly taken when an application for its reconsideration was not filed with the Commission until May 14, 1970 instead of within thirty days after such publication as required by D. C. Code §43-704.

2. Whether an appeal from Order No. 5429, published by the Commission on April 15, 1970, was properly taken on June 15, 1970 in view of the facts that (i) the Order was an interlocutory order or decision which did not authorize any increase in rates or otherwise affect the appellant and (ii) the appellant filed no application for reconsideration, and took no appeal, from the final Order (No. 5436), published on June 29, 1970, which authorized increased rates in implementation of interlocutory Order No. 5429.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24944

LEONARD S. GOODMAN,
Appellant,
v.

PUBLIC SERVICE COMMISSION OF
THE DISTRICT OF COLUMBIA, and
POTOMAC ELECTRIC POWER COMPANY,

Appellees.

Appeal from the United States District
Court for the District of Columbia

BRIEF FOR APPELLEE
POTOMAC ELECTRIC POWER COMPANY

COUNTER-STATEMENT OF THE CASE

Potomac Electric Power Company ("Pepco"), one of the appellees herein, accepts appellant Goodman's "Statement of the Case", subject to the following corrections and additions:

1. In the opening sentence of his Statement, Mr. Goodman describes the action as being one to appeal and vacate a decision of the Public Service Commission

of the District of Columbia (the "Commission") "directing that retail electric service rates in the District be increased by an overall 11.24 percent". This is incorrect. Subsequent to the issuance of Order No. 5419 (J.A. 27), dated January 30, 1970 (which authorized a 5% surcharge increase in rates, effective February 2, 1970), no order was issued by the Commission "directing that retail electric service rates in the District be increased" until some two weeks after Mr. Goodman's Complaint for Injunctive Relief and Petition of Appeal (J.A. 3) was filed in the District Court, when the Commission issued Order No. 5436 (J.A. 102), dated June 29, 1970. The Commission's Order No. 5429 (J.A. 38), dated April 15, 1970 (which, in his argument before the District Court, Mr.Goodman said [J.A. 19] "is the order here on appeal"), did not direct or impose any increase in electric service rates. Rather, after making various findings as to rate base, operating income, rate of return, required revenue, etc., it directed Pepco to submit, and to serve on the parties, "proposed [rate] schedules and written testimony in support thereof, designed to increase its gross operating revenues" by a specified amount (J.A. 82), and directed a public hearing "on the implementation of this Opinion and Order" to be held on a specified date some forty days later (J.A. 83).

2. In Order No. 5419,* discussed on pages 5-7 of Mr. Goodman's Statement, the Commission did not include any "provision for a refund", such as counsel for Pepco assumed probably would be the case when he made his remarks of August 25, 1969 and September 15, 1969 which are quoted on pages 3-5 of Mr. Goodman's Statement.

3. In its Order No. 5434, discussed on pages 9 and 10 of Mr. Goodman's Statement, the Commission did not "reject" Pepco's position that the petition for reconsideration was untimely. Rather, it said that "In any event, we see no need to decide this question in passing on the petition before us" (J.A. 94).

4. Subsequent to Order No. 5419, issued on January 30, 1970, the Commission's Order No. 5436 (J.A. 102), entered on June 29, 1970 and discussed on page 10 of Mr. Goodman's Statement, was the only order issued "directing that retail electric service rates in the District be increased" (to use the language of the opening sentence of Mr. Goodman's Statement). Except as a matter of extra-record information, such Order was not before the Court below, and is not before this Court, because it was not

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* In his argument before the District Court (J.A. 18) Mr. Goodman acknowledged that Order No. 5419 "has not been appealed".

published until some two weeks after Mr. Goodman filed his complaint and petition (J.A. 3) in the District Court; because he has never filed with the Commission an application for its reconsideration, as required by D. C. Code §43-704; and because it was not appealed in his complaint and petition.*

5. Both the Commission and Pepco in their respective motions to dismiss (Record Doc. No. 13 and J.A. 9), discussed on page 10 of Mr. Goodman's Statement, challenged the complaint and petition on the grounds that (i) Order No. 5419, at the time of its publication on January 30, 1970, was a final order or decision which affected Mr. Goodman and as to which he filed no application for reconsideration until May 14, 1970 instead of within thirty days after such publication, as required by D. C. Code §43-704, (ii) Order No. 5429 was not a final order or decision, and (iii) such later Order did not affect Mr. Goodman.

6. Contrary to what Mr. Goodman says in the last paragraph of his Statement of the Case, on page 11 of his brief, the District Judge did not hold "that appellant Goodman was not affected by any order until the entry of

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* In his argument before the District Court (J.A. 19) Mr. Goodman acknowledged that Order No. 5436 "has not been appealed".

Order No. 5436". Rather, Judge Pratt expressly decided that Mr. Goodman was affected by Order No. 5419 at the time it was issued on January 30, 1970 (J.A. 15).

7. Mr. Goodman did not appear, and took no part whatsoever, in the proceedings before the Commission which led to the issuance of the Commission's Orders 5419, 5429 and 5436. However, the following parties, among others, did participate in the proceedings: The Administrator of General Services, acting on behalf of the Executive Agencies of the United States Government; D. C. City-Wide Consumer Council, the Urban League; Capitol Group Ministry, Inc.; United Planning Organization; and the Consumer Council, CHANGE, Inc.

8. Mr. Goodman is the only person who has appealed from the rate-making action of the Commission and none of the parties who took part in the proceedings before the Commission has sought to participate in his appeal proceeding.*

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* The Urban League did intervene, and take an active part, as a defendant in Pepco's appeal from the non-rate-making Section 4 of Order No. 5429, which appeal is docketed in the District Court as C. A. No. 2384-70.

ARGUMENT

I. Introduction

Basic to the proper disposition of this appeal is an understanding of the simplicity of the setting in which it comes before the Court and of the issues which it presents to the Court.

No issues are presented involving questions of the "public interest". No issues are presented requiring judicial interpretation to assure that substantive justice is done.

Fundamentally, all the Court has before it is the question of whether an individual litigant should be required to conform to the applicable statutory provisions controlling appeals from orders of the Commission or whether, for no discernible reason, he should be permitted to warp those rules to suit his personal whim.

Mr. Goodman is a lawyer who represents no one but himself. He was not sufficiently concerned with the proceedings before the Commission which led up to the issuance of Orders 5419, 5429 and 5436 to participate in those proceedings or even to enter an appearance before the Commission. When Order 5419 was published on January 30,

1970, directly affecting him by increasing his electric bill by 5% effective on February 2, he saw no reason for asking the Commission to reconsider the Order, even though, quite patently, the Order immediately affected him adversely.

However, in the Spring of 1970, following the Commission's issuance of its Order 5429, he apparently developed an interest in the proceeding, for on May 14 he filed with the Commission a petition for reconsideration in which he asked the Commission "to reconsider its findings, opinion and order of April 15, 1970, and the interim increase granted on January 30, 1970" (Attach. No. 5 to Record Doc. No. 1)*.

It is assumed that at the time he filed such petition, Mr. Goodman was familiar with the holding in Leeman v. Public Utilities Commission, 104 F. Supp. 553, 556 (D.D.C., 1952), rev'd on other grounds 93 U.S. App. D.C. 194, 213 F. 2d 176 (1953), cert. den. 348 U.S. 816, which is discussed in IV, below. Nevertheless it is perfectly understandable that in order fully to protect himself in his projected appeal of Order 5429 he thought it advisable (despite that holding) to file his May 14 petition for reconsideration within thirty days after the issuance of that Order even though it was clearly out of time as a petition with respect to Order 5419.

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* Nowhere in the petition or its attached affidavit did Mr. Goodman identify either Order by number.

In any event, following that filing, Pepco, on May 20, filed with the Commission, and served on Mr. Goodman, a statement (Item No. 59 listed in Record Doc. No. 4) with respect to his reconsideration petition which attacked it on the ground that Order 5429 was not a "final" order, and hence not properly subject to an application for reconsideration, and fully alerted Mr. Goodman to the issues of statutory compliance which are now before this Court in this appeal.

Despite the notice which he was thus given as to Pepco's views with respect to the course of action necessary for an appeal properly to be perfected, Mr. Goodman elected, for no known reason, not to follow that course, even as a protective safeguard. Indeed, after his petition for reconsideration had been denied by the Commission, after he had filed his complaint and petition in the District Court, and after Pepco had moved to dismiss (J.A. 9) on the ground that he was appealing the wrong order, he still had ample time to apply to the Commission for reconsideration of its Order No. 5436, published on June 29, 1970, and, following its action on that application, to appeal that Order to the District Court if the application had

been denied.*

Thus this Court has before it an appellant who is an attorney versed in the law and who was particularly informed as to the time requirements for the appeals brought in this action, yet who chose for no discernible reason not to comply with the statutory requirements. Now he urges this Court to relieve him of the consequences of this wilful action on his part by a strained and wholly unnecessary construction of the very clear statutory provisions.

The course which Mr. Goodman followed, and now seeks to have this Court validate, is not only contrary to the clear requirements of the statutes, but also in any rate increase proceeding could result in substantial disadvantage and hardship to the utility, the Commission and any other

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* Pepco's motion to dismiss was filed in the District Court on July 6, 1970 and since Order No. 5436 was issued on June 29, 1970 it is readily computable that Mr. Goodman had at least until about September 25, 1970 to cure the challenged weakness in his case by appealing Order No. 5436 to the District Court. Just as obviously he could, had he so chosen, have shortened that maximum permissible time very considerably by moving promptly with a proper application for reconsideration and a proper appeal from its assumed denial.

parties, as well as to the Courts, because it could make for multiple appeals -- i.e., first an appeal from the "Phase I" order (here Order No. 5429) and then, after the litigation consequent on the first appeal had run its course, a second appeal, and resulting time-consuming burdens on the parties and the Courts, from the "Phase II" order (here Order No. 5436).

Mr. Goodman seeks, in his presentation by brief, to disguise the arbitrary ineptness of his appellate approach by asserting, in effect, that it would have been a useless thing for him to have waited for the normal conclusion of the proceedings before the Commission (i.e., the issuance of Phase II Order No. 5436) before launching his appeal to the Courts. That argument comes ill from one who, at no risk of personal inconvenience or loss or disadvantage, could readily have perfected an appeal from Order No. 5436 to take the place of, or complement, his improper appeal from Order No. 5429.

II. The Applicable Statutes

§43-704 of the District of Columbia Code says, in part:

> "Any ... person ... affected by any final order or decision of the commission may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No ... person ... shall in any court urge or rely on any ground not so set forth in said application. The commission, within thirty days after the filing of such application, shall either grant or deny it. ... No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined."

Similarly, Section 43-705 of the Code says:

> "... Any ... person ... affected by any final order or decision of the Commission ... may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the United States District Court ... a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal ... Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission ... upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: ... Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. ..."

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Paraphrasing into capsule form the most directly pertinent portions of the above quotations from §§43-704 and 43-705 of the Code, it can be said that under the statute only a person affected by a final order or decision of the Commission may appeal the same and then only if, within thirty days after its publication, he has filed with the Commission an application for its reconsideration which subsequently has been determined by the Commission.

III. Order No. 5419 Was A Final Order Or Decision Which Affected The Appellant And, No Application For Its Reconsideration Having Been Filed Within Thirty Days After Its Publication, Is Non-Appealable.

The two "ordering" sections of Order No. 5419 read as follows (J.A. 35):

> "Section 1. That Potomac Electric Power Company be, and it is hereby, authorized to add to all bills for electric service furnished by it to customers in the District of Columbia on and after February 2, 1970, and until further order of the Commission, a surcharge in the amount of 5% of such bills.
>
> "Section 2. That the Potomac Electric Power Company is directed to file amended tariffs on or before February 2, 1970, to implement the preceding ordering paragraph."

Nothing could have been more "final" than that and nothing could have more directly "affected" Mr. Goodman in his role as a District customer of Pepco. As the Appellate Court of Indiana, In Banc, said in American Vitrified Products Co. v. Public Service Commission, 176 N.E. 2d 145, 150 (1961):

> "... In so far as ratepayers are concerned, nothing can be more final or adverse to them than an increase of rates which goes into effect immediately."

Mr. Goodman, in the affidavit dated May 13, 1970 annexed to his petition for reconsideration filed with the Commission on May 14, 1970 (Attach. No. 5 to Record Doc. No. 1), says that

> "He is a consumer of electricity in the District of Columbia and is affected by ... the interim order of January 30, 1970."

Since at the date of such affidavit the January 30 Order (No. 5419) was operating in precisely the same fashion as it had begun to operate on February 2, 1970, when its 5% rate increase surcharge went into effect, it follows that if Mr. Goodman was "affected" by the Order on May 13, 1970, as he swore, he must equally have been affected by it on February 2, the effective date of its rate increase, and on all dates intervening between February 2 and May 13.*

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* In his argument before the District Court (J.A. 23) Mr. Goodman admitted that as a user of electricity "He was affected [by Order 5419] as of February 2nd, 1970".

Further, in his opposition, dated July 13, 1970, to Pepco's motion to dismiss, Mr. Goodman admits (page 2, Record Doc. No. 7) that the January 30 Order (No. 5419) was final with respect to whether an increase should be permitted on an interim basis. That, of course, is all that Pepco claims for it, since that was all the Order purported to do. And it is Pepco's position that the propriety and legality of such Order must stand or fall on the basis of the opinion which accompanied it and the record which lay behind it.

Notwithstanding the fact that No. 5419 was a "final" and "affecting" order when it was published, Mr. Goodman filed no application for its reconsideration until May 14, which was a date more than ninety days after the publication of the Order. Accordingly, under the statute (which requires that the application for reconsideration be filed within thirty days after the publication of the order, and makes such a filing a sine qua non to an appeal) such Order was not appealable by Mr. Goodman on June 15, 1970.

In his brief (pp. 12 and 13) Mr. Goodman argues that "Order No. 5419 remained open to revision and possible

refunds until the entry of Order No. 5429", saying that

> "The interim order was entered only on the basis of the company's emergency application; the interim relief was thereafter subject to revision and refund until the Commission had reached a final decision regarding the company's need for revenue."

But in Order No. 5419 the Commission included no "provision for a refund", such as counsel for Pepco had suggested as a possibility at the August 25, 1969 prehearing conference and elsewhere (Goodman Brief, pp. 3-5). Rather, as is clear from the above-quoted ordering paragraphs, the Order was absolute and final, with no escape clause permitting a refund to be directed by the Commission at a later date should it then be found that the authorized 5% surcharge was excessive.

In Washington Gas Light Co. v. Baker, 88 U.S. App. D. C. 115, 188 F. 2d 11 (1950), cert. den. 340 U. S. 952, this Court had before it a challenged rate order of the Commission which was attacked on the ground, among others, that there was no adequate rate of return evidence in the record to support the Commission's determination on the point. This Court, speaking through Judge Bazelon, said (88 U.S. App. D. C. 121, 188 F. 2d 17):

"Although the Commission's opinion makes no attempt to explain this fatal deficiency in the record, a review of the transcript indicates that the Commission may have based its action on one or both of two possible grounds: (1) That this was an emergency proceeding which relieved the parties from conducting what they referred to as 'a full rate hearing' in which proof regarding rate of return would concededly be necessary. While there is no specific statutory provision for such an emergency proceeding, we do not undertake to say whether or under what circumstances the Commission would be warranted in approving rates pursuant to something less than a full rate hearing ... Moreover, it seems to us that if rates were to be granted for emergency purposes in a summary proceeding, provision would have to be made for adjustment of subsequent rates ... if upon a statutory 'full rate hearing' it were found that the emergency rates had produced either excessive or inadequate returns. ..."

It is that "provision would have to be made for adjustment" language which counsel for Pepco had in mind when he made the remarks at the August 25, 1969 prehearing conference and the September 15, 1969 hearing which are quoted on pages 3-5 of Mr. Goodman's brief.

In the light of the above-quoted language from Baker, it is possible that the omission from Order No. 5419 of a provision for a refund or some other adjustment in the event that it was finally decided that the authorized 5% surcharge was excessive made the Order attackable through

a timely application for reconsideration, followed by appropriate judicial review proceedings, if necessary. But under the statute such an attack had to be mounted within thirty days after the publication of the Order. Once that period had expired with no application for reconsideration having been filed Order 5419 became unassailable and no later order could require a refund of revenues collected pursuant to its terms.

As this Court said in United States v. Public Utilities Commission, 81 U.S. App. D.C. 237, 241, 158 F. 2d 533, 537 (1946), cert. den. 331 U.S. 816:

> "... The Act permits any person affected by a final order of the Commission to appeal ... . The ... orders which fixed the rates became final and conclusive when no person affected thereby availed himself of the right of appeal. Consequently the rates so fixed became the legal rates for the periods during which they were to endure, and neither the United States nor any other party affected thereby can brand them as illegal. All the arguments of the government, being based on the mistaken idea that the orders made by the Commission in past years can be attacked now, must be rejected ... ."

The Commission did not include in Order 5419 any provision for a future adjustment of rates, or for a refund, in the event that the amount of the emergency 5% surcharge increase should ultimately prove to be excessive. Clearly,

that decision was a deliberate and informed one* and quite probably it was based on the Commission's conclusion, spelled out in great detail in Order No. 5419, that the 5% surcharge was so low, in terms of all the evidence before the Commission, that it could not conceivably turn out, when Phase I of the proceedings was completed, to have been excessive. Thus, in concluding its discussion in 5419 of the amount of the emergency relief to be allowed, the Commission said (J.A. 32):

> "... The earnings which a 5% interim increase will produce, in our opinion, would ... not require Pepco customers to pay excessive rates, or rates which might, under our final decision, require refund."

In other words, the Commission, ever sensitive to its obligation never in any way to permit an overcharging of Pepco's customers, was satisfied that it had fixed the surcharge percentage at a figure so low as to guarantee that it could never turn out to have been excessive and had thus freed itself of the practical necessity for including in its Order a refund or adjustment provision.

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* The Commission was undoubtedly aware that the companion order of the Maryland Public Service Commission (No. 57963, Case No. 6258), issued on the same day as Order 5419 and granting the same emergency relief, in terms of Pepco's Maryland business, as did 5419 with respect to its District business, did contain a refund provision to operate should it ultimately be found that the 5% surcharge was excessive. In 5419 the District Commission acknowledged that it had "coordinated" its disposition of the request for emergency relief with the Maryland Commission (J.A. 27). No appeal was taken or refund sought in Maryland.

IV. Order No. 5429 Was Not A Final Order Or Decision Which Affected The Appellant And Hence Is Non-Appealable.

1. Order No. 5429 was not a "final" order or decision within the meaning of §43-705 of the Code, quoted in II, above, insofar as rate-making is concerned. Rather, it was a preliminary or interlocutory order which set the guidelines for the preparation by Pepco of rate schedules subsequently to be filed with the Commission and made the subject of a public hearing. Its "ordering" Sections 1 and 2 merely directed Pepco to submit to the Commission proposed rate schedules, and supporting testimony, designed (in accordance with the findings and conclusions accompanying the Order) to produce a specified annual increase in gross operating revenues, and to serve copies thereof upon the parties of record, and its Section 3 set the date, time and place for a public hearing to be held on the implementation of the Order (J.A. 82 and 83).

Thus Order No. 5429 constituted the Commission's announcement of its guidelines for the second phase of the proceeding and, until the succeeding rate-making order (No. 5436) was entered in such second phase, such conclusions had no effect either on Pepco's rate structure or on its customers' bills for electric service. Differing sharply

from Order No. 5419, discussed above, Order No. 5429 did nothing, absent a subsequent, implementing, rate order. Accordingly, it was in no sense a "final" order or decision.

Leeman v. Public Utilities Commission, above, involved, in part, an appeal by the United States from a Phase II order of the Commission fixing rates for Pepco in which Pepco questioned the right of the United States to appeal on the ground that the United States had not filed with the Commission a petition for reconsideration of the Commission's "Phase I" order (the order comparable to Order No. 5429 in the case at bar) within thirty days after the publication of such order. The District Court overruled Pepco's objection and in doing so said (104 F. Supp. 556):

> "... The applicable statute, in effect, provides that in order to be qualified to appeal from an order of the Commission, the party claiming to be aggrieved must make an application to the Commission for reconsideration within thirty days after the publication of its final order or decision. It is objected by the respondents that the United States ... is not entitled to be heard on appeal because of alleged failure to comply with this requirement. Admittedly the United States filed

> no petition for reconsideration within the thirty-day period after the promulgation of the first order of the Commission ... . Such a petition was filed by it, however, within thirty days after the making of the final order of the Commission ... . On preliminary motions to dismiss the appeal of the Government, this Court held that the United States satisfied the statutory provision, since the first order of the Commission was in effect an interlocutory order formulating merely the principles on which the new rate schedules should be prescribed, while the second order prescribing the actual rates should be regarded as the final order. The situation is similar to that of an interlocutory judgment of a court followed by a final judgment. An appeal from the final judgment brings up for review questions determined by the interlocutory decree. In the same manner in this case the final order prescribing the actual rates brings up for review the prior order, which formulated the principles on which the new rates should be based. In view of these considerations the motions to dismiss the appeal of the United States were denied." (Emphasis supplied.)

In the case at bar we have precisely the same situation, presented in reverse. Here, an appeal from the "Phase I", interlocutory, Order (No. 5429) was filed even before the "Phase II", or final, Order was published and thus before any application for reconsideration with respect to such final Order could possibly have been filed. Clearly such an appeal is not permitted by the statute and should be dismissed, because the Phase I Order was not a "final" one within the meaning of the statute.

2. Wholly apart from the question of its finality, Order No. 5429 is not appealable by Mr. Goodman because

it was not an order or decision which "affected" him within the meaning of §43-705 of the Code. As previously noted, the order did nothing, absent a subsequent, implementing, rate-making order. Obviously, then, it cannot be said to have "affected" Mr. Goodman.* As a Pepco customer he was affected by the later Phase II Order (No. 5436) which increased Pepco's charges for electricity to his customer classification, among others, but that is not to say that he was "affected" by Phase I Order No. 5429.

3. In his brief Mr. Goodman advances the argument that 5429 was a final order or decision which affected him because, he says (Brief, p. 13), the Commission there "cut off all right to refund or restitution of the interim increase".

But, as we have seen, 5419 contained no provision for a subsequent refund. Its omission may, as suggested above, have made 5419 attackable at the time it was issued, but, that time for attack having run out thirty days later, the Order was thereafter unassailable and nothing that the Commission later did could affect it retroactively. Mr. Goodman had no refund rights under 5419 as it was written and thus no such rights were "cut off" when it issued Order 5429.

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* In his argument before the District Court (J.A. 22-25), Mr. Goodman admitted that it was possible, at the time Order 5429 was issued, that a rate structure might ultimately be designed and placed in effect, in implementation of such Order, which would not "affect" him as a ratepayer.

At pages 12 and 13 of his brief Mr. Goodman, in support of his assertion (discussed in III, above) that the interim relief granted by 5419 was "subject to revision and refund until the Commission had reached a final decision regarding the company's need for revenue", quotes a statement by Judge Wright in Moss v. Civil Aeronautics Board, ____ U.S. App. D.C. _____, 430 F. 2d 891, 901 (1970), to the effect that any approval of rates under the conditions of that case "would be subject to revision once more complete information is obtained".

What Judge Wright thus said might have been in point had Mr. Goodman made a timely attack on Order 5419 within the thirty day statutory period following its issuance. But that is a far cry from saying, as Mr. Goodman here does, that once that statutory period had run without such an attack having been made Order 5419 continued to be subject to invalidation. Mr. Goodman's difficulty, and fault, lies in the fact that, unlike the complaining Congressmen in Moss, he did not make a timely attack on the Commission's action.

4. Mr. Goodman (at Brief pp. 13 and 14) asserts that because the Commission, in its Order No. 5434 denying his petition for reconsideration, indicated that any later petition, made after the entry of the Phase II order, would have been similarly denied, there was nothing further for the Commission to do, and, therefore, it had entered its final decision on the merits of the increase, citing a statement made by the Supreme Court in Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, _____ U.S. _____, 27 L. Ed. 2d 203, 210, 39 L.W. 4007, 4009 (1970):

> "... Moreover, the relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action",

and adding (still quoting from the same opinion) that in that case "there was no possible disruption of the administrative process; there was nothing else for the Commission

to do. And certainly the Commission's action was expected to and did have legal consequences".

But here, in cases such as ours, the "orderly process of adjudication" would be disrupted by premature judicial review of a Phase I order (here No. 5429) on the ground that it is appealable as a "final" order or decision which "affects" a utility's customers. Such a holding would dictate that the Phase II order (here No. 5436 -- not before the Court) should be held in abeyance until the conclusion of all litigation, or possibility of litigation, with respect to the Phase I order. That, of course, could involve a delay of perhaps as much as two or three years before the Phase II order could be issued, which would mean that the utility would have no rate relief during that waiting period. And then, when the period had passed and the Phase II order had finally been issued, the utility would be faced with the possibility of further litigation as to the propriety of the rate schedules placed in effect by the Phase II order.

Contrariwise, the "orderly process of adjudication" is maintained by the doctrine enunciated in Leeman v. Public Utilities Commission, above, -- the final, Phase II order

follows promptly after the Phase I order and judicial review initiated following that later order can embrace all the issues decided in the proceeding.

Further, in our case it is plain that solely on the basis of Order No. 5429, without its implementation by Order No. 5436, no "rights or obligations have been determined" and no "legal consequences will flow from the agency action". And in our case it is also clear that much was left for the Commission to do after it published Order No. 5429 -- it still had before it the design and approval of implementing rate schedules, without which there could in no event be any effect on Mr. Goodman and which, when finalized, could quite conceivably have been such as would have had no effect whatsoever on him.

The Supreme Court also said in Port of Boston, above, in denying Transatlantic's appeal:

> "... it had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals. It chose not to do so. Certainly, from this posture, it cannot force collateral redetermination of the same issue in a different and inappropriate forum" (27 L. Ed. 2d 211, 39 L.W. 4010),

a statement which is of peculiar appropriateness with respect to the posture in which Mr. Goodman presents himself to the Courts.

5. At page 15 of his brief, Mr. Goodman quotes from Algonquin Gas Transmission Co. v. Federal Power Commission, 201 F. 2d 334, 337 (1st Cir., 1953), to the effect that judicial review need not necessarily "await the ultimate order finally terminating the underlying proceeding; but the order to be reviewable must be administrative action of a substantial character approaching some degree of finality". Noteworthily, he fails to mention the opening sentence of the next following paragraph of that opinion:

> "Certain types of interlocutory orders, not immediately reviewable, may infect with invalidity the final order of the administrative agency; in which case, upon judicial review of the final order, the interlocutory order will be reviewed so far as it may have affected the final order"

which the Court then proceeded to find was not properly descriptive of the appealed order in that case.

This last quoted language, of course, aptly describes the type of interlocutory order (No. 5429) that we have in this case, and the quotation, in effect, says precisely what the District Court said in the Leeman decision, above. In other words in such cases the appeal should be taken from the final Order (here No. 5436) and would then bring before the Court for review the conclusions reached in the interlocutory Order (here No. 5429).

6. Mr. Goodman also argues (Brief, p. 16) that Order No. 5429, as amended, is a final "decision", if not a final "order",* because it was of a

> "definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case",

quoting from Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938).

In clear contrast to that 1938 language is the Supreme Court's later (1948) incisive language in Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 112-113:

> "... [A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. ..."

which language was quoted, and followed, by this Court in Fort Harrison Telecasting Corporation v. Federal Communications Commission, 111 U.S. App. D.C. 368, 370, 297 F. 2d 779, 781 (1961).

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* As to this attempted distinction between the words "order" and "decision", we suggest that so far as substance is concerned it is an empty one. The use of the two words in the sections of the District of Columbia Code with which we are concerned (§§43-704 and 43-705) might have arisen from an effort by the draftsman semantically to cover the so-called, and once popular, "negative order", as well as the more readily dealt with "affirmative" order.

Even if the language Mr. Goodman quotes from Metropolitan Edison Co. were properly descriptive of finality as that term is used in the statute with respect to the Commission's "decisions", as distinguished from its "orders" (assuming there is such a distinction*), it is very clear that the quoted language does not in any way attempt to delineate what kind of decision may be said to "affect" a person within the meaning of the statute. And it is Pepco's position, of course, that Order No. 5429, even if it be considered a "final decision" of the Commission (which Pepco maintains it was not), certainly was not one which "affected" Mr. Goodman. Thus the cited case offers the Court no basis for upholding Mr. Goodman's contention.

7. At page 16 of his brief Mr. Goodman makes the flat statement that "The ruling below is in direct conflict with the decision of this Court in Washington Gas Light Co. v. Baker", above, saying that there this Court held that a rate decision reached after a statutory "full rate hearing" is subject to plenary judicial review, whether

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* Actually, Metropolitan Edison Co. does not make any such distinction -- it talks only about "orders".

or not new tariffs have been authorized. In the context of our case that, of course, is a complete mis-reading of the Baker decision.

Baker was an appeal from an order of the Commission (No. 3600, dated November 9, 1949) which, in and of itself, covered the entire ground now covered by the "Phase I" interlocutory order and the "Phase II" final rate-making order with which we have since become familiar. In other words, in the days of Baker the Commission issued a single order instead of separate Phase I and Phase II orders. And in that decision this Court merely said that having found the order fatally defective on a number of points relating to the amount of the revenue increase to be allowed (i.e., matters such as are now dealt with in a Phase I order), and hence requiring reversal, there was no need for the Court to deal with the attacks upon the approved rate schedules alleged to be discriminatory -- even though those rate schedules were before the Court. This, of course, differs sharply from the situation in the case at bar, where the order fixing the rates and approving the rate schedules (No. 5436, dated June 29, 1970) is not before the Court. Thus, in that aspect the Baker case has no bearing whatsoever on the appeal now before the Court.

V. Order No. 5436, Which Established The Now Existing Rates, Is Not Before The Court.

Pepco's now existing District of Columbia rates went into effect on July 1, 1970 pursuant to a Commission Order (No. 5436) published on June 29, 1970 -- a date two weeks subsequent to the filing in the District Court of Mr. Goodman's complaint and petition.

Order No. 5429, in conjunction with such later Order No. 5436, did not continue Order No. 5419's emergency increase in effect. Instead No. 5436 substituted for Pepco's theretofore effective rates (including the 5% surcharge) a whole new set of rates. When 5436 became effective, 5419 ceased to be of any effect whatsoever.

Order No. 5436 was not included in the record of the proceedings before the Commission, as certified to the District Court by the Commission, for the obvious reason that it was not issued until after the filing of Mr. Goodman's complaint and petition. Further, Mr. Goodman thereafter knowingly elected not to file with the Commission an application for reconsideration of Order No. 5436, and the thirty days allowed by the statute for such a filing

have long since expired. Why he permitted the time so to run without filing such an application, Pepco does not know, but it is now a fact. He has only himself for a client, so it obviously was a choice which he was wholly free to make, and make it he did -- even in the face of Pepco's then pending motion to dismiss.

Accordingly, it is clear that such final, post-appeal Order No. 5436 was not before the District Court and is not before this Court. And since Pepco's now existing rates are in effect only by virtue of that order it is equally clear that they cannot be before either Court.

CONCLUSION

Pepco urges the Court to dispose of this appeal in accordance with the language of the statutes, and not to engraft on that language an interpretation which will do violence to its plain meaning. Certainly, no equities or considerations of public interest are here present to warrant bending the statutory provisions. As earlier indicated, the public interest was well represented in the proceedings before the Commission (in which Mr. Goodman chose to take no part) by a number of socially oriented

intervenors and none of them is appealing the Commission's action. The sole appellant is a lawyer who, representing only himself, knowingly and for no discernible reason elected to ignore the clear language of the statutes, and the equally clear language of the Leeman decision.

Order No. 5419 was a final order or decision which affected Mr. Goodman when it was issued and of which he failed to seek timely review; Order No. 5429 was not a final order or decision which affected him and hence is not reviewable; and Order No. 5436 was not made the subject of review proceedings. Accordingly, the appeal should be dismissed and the dismissal order of the District Judge should be affirmed.

Respectfully submitted,

Washington, D. C.,

February 3, 1971.

HAMILTON AND HAMILTON

By: STEPHEN A. TRIMBLE
Union Trust Building,
Washington, D.C. 20005

CORNELIUS MEANS
929 E Street, N. W.,
Washington, D. C. 20004

Attorneys for
Potomac Electric Power Company

Of Counsel:

RICHARD W. EMORY
Venable, Baetjer and Howard,
2 Hopkins Plaza,
Baltimore, Maryland 21201

W. JOHN KENNEY
Cox, Langford & Brown,
1521 New Hampshire Ave., N.W.,
Washington, D. C. 20036

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24944

LEONARD S. GOODMAN,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, and POTOMAC ELECTRIC POWER COMPANY,

Appellees.

REPLY BRIEF FOR APPELLANT

On Appeal from the
United States District Court
For the District of Columbia

LEONARD S. GOODMAN

7119 16th St., N.W.
Washington, D.C. 20012

February 12, 1971

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REPLY BRIEF FOR APPELLANT

STATEMENT

The appellant Goodman brought before the District Court the merits of a general increase of 11.25% in the rates for electric service in the District of Columbia which had been authorized and directed by the Public Service Commission of the District of Columbia. The suit sought judicial protection against unjust and excessive rates. The District Court refused to review the merits simply because the appellant did not await a Commission order distributing the increase among all the company's customers. The latter (Order 5436, J.A. 102) was issued

by the Commission prior to the ruling below, and indeed was shown not to involve the merits in any respect. Nevertheless, the lower court relied upon the doctrine of finality to dismiss the action.

The doctrine of finality is well-known to this Court. Like the doctrines of ripeness and exhaustion of administrative remedies, it seeks to prevent issues from being prematurely brought before the courts for judicial review. The District Court, however, has so construed the statute governing appeals from decisions of the Commission that the merits of an important decision of that agency have been insulated from all judicial review.

As the company concedes (Brief, p. 6), the suit of the appellant Goodman now before this Court is the only one seeking judicial review of the merits of the 11.25% rate increase. Whether any court will review the merits of that increase now hangs in the balance on this appeal.

The limited issue before the Court is one that involves important aspects of the public interest. The papers in this appeal show that the doctrine of finality has been misused to the detriment of the consuming public of the District of Columbia. The offices of this Court are called upon to prevent substantial injustice.

I.

EVEN A STRICT READING OF THE STATUTE SUPPORTS THE JURISDICTION OF THE DISTRICT COURT TO REVIEW THE MERITS OF THE RATE INCREASE

The Commission argues that Order 5436 was the only final order and such order could not be brought before the District Court, "since no petition for reconsideration had been filed with respect to it" (Brief, p. 17). It also relies on the late Judge Holtzoff's statement in the Leeman case,[1] for the proposition that an appeal of Order 5436 establishing the rate would have brought up for review "the prior order which formulated the principles on which the new rates should be based." (id. at p. 13). Thus, in the view of the Commission and the company, the appellant could have filed an identical petition for reconsideration on the merits of the rate increase after Order 5436 was entered. In their view, the mere filing and denial of the petition prior to the entry of Order 5436 renders the District Court without jurisdiction to entertain the complaint. The appellees' position does not withstand the most meager analysis.

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[1] Leeman v. Public Utilities Commission, 104 F.Supp. 553 (D.D.C., 1952), rev'd on other grounds 93 U.S.App.D.C. 194, 213 F.2d 176 (1954), cert. denied 348 U.S. 816.

Section 43-704 of the District of Columbia Code says that a petition for reconsideration "may" be filed within thirty days after the publication of an order. The statute nowhere requires the filing to occur after the final order is published. The section further provides:

> No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined.

Section 43-705 similarly provides for an appeal "within sixty days after final action by the Commission upon the petition for reconsideration." The statute does not require that a petition for reconsideration physically be filed only after the final order is published as a prerequisite to judicial review.

When all the rhetoric of the appellees is swept aside, their only argument rests on the completely unsupported assumption that somehow the statute requires a chronological progression of final Commission order, followed by the filing of a petition for reconsideration, and only then the filing of a complaint in the District Court. Even if Order 5436 were the only final order and the only final decision of the Commission, which we deny, even so there was no statutory requirement that precluded the filing of a petition for reconsideration of the merits prior to the entry of that order.

The statute only requires that a petition for reconsideration be "made and determined" before appeal to the courts, or that "final action" shall have been taken on the petition. The facts of record before this Court show that a petition for reconsideration of the merits of the increase was "made and determined" and "final action" was taken on the petition prior to the entry of Order 5436.

The company asks why the appellant did not cure the alleged defect in his pleadings by filing for reconsideration of Order 5436. The appellant responds by asking why did the Commission accept the petition for reconsideration for filing rather than hold it until it was allegedly timely. The fact is that the petition was timely when it was filed.

The Commission acted on appellant's petition for reconsideration of the merits in its Order No. 5434 (J.A. 84). The Commission stated in that order, that if the petition were filed later, it would be denied (J.A. 94); and the Commission repeats on brief (p. 15) that its "conclusions on the merits of his /appellant Goodman's/ contentions...would have been the same at any time." There is no dispute among the parties, therefore, that the Commission had formed an unalterable opinion on the merits of the case with the denial

of appellant's petition for reconsideration.

The company declares before this Court that it "fully alerted" the appellant to the issues now before this Court in its opposition to the filing of a petition for reconsideration of Order 5429. To be sure, if the Commission had suggested in Order 5434 that it was of an open mind on the merits, appellant Goodman would indeed have filed a further petition for reconsideration. But there was no equivocation on the part of the Commission. It plainly determined with finality the issues raised by the appellant in his petition; and appellant was entitled to rely on that representation.

The statute does not mean, as the Commission and the company seem to assume, that after the denial of the petition for reconsideration and after the filing of the complaint, the appellant was required to refile the petition to obtain a repetition of the denial, and then to amend the complaint. The fact that such a charade would have satisfied the appellees' view of the statute shows that nothing of substance flows from their construction of the statute.

The company says that it fears separate appeals will be taken in the future from the merits of an increase, as distinguished from the structure of the rates (the discrimination issues). Since all appeals must be filed

in the same court within sixty days of the order in question, an easy consolidation of the appeals can be made, and the company is under no burden.

On the other hand, permitting an appeal of the merits without awaiting rate structure questions to be decided protects the consumer. Let us assume that an interim increase is allowed in the future, and, as here, is affirmed with the decision on the merits in the Phase I order. Let us also assume that unlike the present case, the Commission and the company dawdle over the form of a permanent increase while the interim one continues to be collected. The ratepayers must have unfettered access to the courts to obtain review of the merits decided in the Phase I order to prevent injustice.

II.

ORDER 5429, AS AMENDED, IS A FINAL ORDER SINCE THE COMMISSION THEREIN ERRED IN FAILING TO DIRECT A REFUND OF THE INTERIM RATES

One reason why it is imperative for the appellant Goodman to establish the appealability of Orders 5429 and 5434 is that in these orders the Commission decided with finality that the company could keep its interim increase. If the Commission had decided, as we think it should have decided, that upon review of all the issues and all the evidence, the interim increase was not justified, then the Commission possessed jurisdiction to order

a refund of the interim rates.

The appellant Goodman was, of course, "affected" by the interim increase when it first became effective; he was also affected by the failure to obtain a refund. Merely because appellant Goodman raised no questions as to whether the company should have been permitted to collect an increase on an interim basis, did not constitute a waiver of his right to question whether the company should permanently retain what it collected. Similarly, the company's right to collect the interim increase is not here in question, but rather its right to keep it once collected.

The company maintains that Order 5419 (J.A. 27) authorizing the interim increase failed to include any "escape clause permitting a refund," and hence no refund was allegedly available to appellant Goodman or any others after entry of that order. The company is estopped by its conduct and representation before the Commission from attacking the Commission's jurisdiction to have ordered a refund.

Prior to the entry of Order 5419, the Commission had questioned its own jurisdiction to allow any increase unless accompanied by a resolution of all issues on the merits. The company thereupon expressly waived objection to the Commission's granting a refund, if the interim

increase were later found not to be justified. Hence with meager findings the Commission proceeded to approve an interim increase. There was no need to include any escape clause; the company's express waiver of any objection to a refund, whenever it should be ordered, was a sufficient protection of the Commission and the consumers.

A case close in point is the recent opinion of the three-judge district court in Admiral-Merchants Motor Freight, Inc. et al. v. United States, et al., C.A.No. C-2030, U.S.D.C., D.Colorado, decided January 14, 1971. In that case, the Interstate Commerce Commission ordered a refund of a general increase in motor carrier rates. The motor carriers had earlier stated they would not object to such a refund if the ICC would grant them an extension of time for filing their evidence. The district court recognized that the ICC had no statutory power to order a refund of motor carrier rates, but held that the motor carriers were equitably estopped, because of their representations before the agency, from attacking the ICC's jurisdiction.

If the Commission in Order 5429 had here found the rate increase allowed on an interim basis to be unjustified, after a review of all the evidence and all the issues on the merits of the increase, it was incumbent

on the Commission to have ordered a refund. Consistent with this Court's ruling in Moss[2] and other cases, if an agency is to grant emergency increases on an interim basis with the right of review limited and narrowed, then the consumer must have his day in court on all remaining issues when the agency has decided with finality to permit the utility to retain the interim increase.

The foregoing result is abundantly fair to the utility. It continues to collect the interim increase during the course of the agency proceeding. If the agency grants a further increase, the utility is required to refund only after a court has decided that the agency erred in permitting the company to retain the increase.

What may give the appearance of an emergency may, as here, on review of the entire record be no emergency at all. If the company may retain what it collects on an interim basis without review of its entitlement to those funds on the basis of all the facts, then the interim decision becomes a mere device by which the merits escape judicial review. The only review of the interim order will be of meager findings perhaps on a partial record. The court's function is not limited to those meager findings, but includes a review function related to the agency's appraisal of the entire record.

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[2] Moss v. Civil Aeronautics Board, U.S.App.D.C. , 430 F.2d 891 (1970).

We think that is what this Court meant in Washington Gas Light Co. v. Baker, 88 U.S.App.D.C. 115, 121, 188 F.2d 11, 17 (1950), cert. den. 340 U.S. 952, when it said, "that if rates were to be granted for emergency purposes in a summary proceeding, provision would have to be made for adjustment of subsequent rates...if upon a statutory 'full rate hearing' it were found that the emergency rates had produced either excessive or inadequate returns."

The company on brief seems to collaterally attack Order 5419 by suggesting that its omission of a provision for a refund made it "attackable at the time it was issued" (Brief, p. 23, and see 17-18). Order 5419 was not "attackable," since consistent with this Court's opinion in Baker an adjustment of the "subsequent rates" could have been made in Orders 5429 or 5434 if the interim rates were found, as they should have been found, excessive. In any event, here the emergency increase was allowed in the context of a company concession of jurisdiction to award a refund, a promise the Commission could and should have redeemed in Orders 5429 or 5434.

The company misrepresents Order 5419 when it suggests that the Commission established the interim increase at a level that it could "guarantee that it could never turn out to have been excessive." (Brief, p. 19). The Commission said that "in our opinion," based on the

partial review of the record made on January 30, 1970, the interim increase would not produce rates that might require a refund. (J.A. 32). Obvicusly it would not allow an interim increase it then knew would require a refund; and just as obviously the Commission could not and did not waive its jurisdiction to order a refund, if the review of the complete record supported that course.

The holding of Circuit Judge Wright in Moss v. Civil Aeronautics Board, U.S.App.D.C. , 430 F.2d 891 (1970), is directly in point. In plain language, Judge Wright held that, "Any approval of rates under such /emergency/ conditions would be subject to revision once more complete information is obtained." (430 F.2d at 901). The Commission fails to discuss the case; the company makes an irrelevant point regarding it.[3] The relevance of Judge Wright's holding here is that the Commission had more complete information in Order 5429, but it failed to make the appropriate revision of the interim increase; and its failure in such order is reviewable in the District Court and in this Court.

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[3] The company (Brief, p. 24) somehow reads the Court's holding as limited to the issues on an appeal of the emergency increase, rather than related to the duty of the agency thereafter "once more complete information is obtained."

III.

THE APPELLANT WAS AFFECTED BY ORDERS 5429 AND 5434.

After Order 5429 was entered by the Commission and affirmed in Order 5434, there was only one way the electric service rates in the District of Columbia could go, and that was up. Order 5429 in terms "directed" the company "to submit...proposed schedules...designed to increase its gross operating revenues within the District of Columbia on an annual basis by $10,220,788 from the level in the test year in accordance with the findings and conclusions accompanying this Order" (J.A. 82). Order 5429 more than "set the guidelines" or "merely formulated principles," as the appellees contend;[4] it was the legal requirement under which the rates were in fact increased in the District of Columbia and which in turn affected the appellant Goodman and others in the District of Columbia as consumers of electricity.[5]

The company seems to assume that only an immediate effect on its rate structure or its customers' bills is legally protected (Brief, pp. 20-21). The scope of the

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[4] Pepco Brief, p. 20; Commission Brief, p. 14.

[5] In very guarded language, the company argues that Order 5436 "could quite conceivably" have produced a rate schedule which "would have had no effect whatsoever" on appellant Goodman (Brief, p. 27). It is true that the appellant conceded this as a possibility at oral argument; he subsequently withdrew the concession, and explained to the lower court that he was both a residential and a commercial customer of the company. See Rec.Doc.No. 16; J.A. 26.

doctrines of finality and standing is not so limited. The fact is that Order 5429 eventually did result in an impact on both the company's rate structure and its customers' bills; but in the meantime Order 5429 provided the legal foundation for the rate changes that were later adopted. Orders 5429 and 5434 changed the legal relationship between the company and its customers.

Besides containing the very specific direction to the company to increase its revenues, Order 5429 allowed only those schedules that would "implement" its findings and conclusions. The Phase II aspect of the Commission was strictly limited to carrying out a final decision covering the direction the rates were to go and the reasons why they were to go in that direction.

In Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), the Supreme Court held that prior to Presidential approval, a Board route award for overseas or foreign air transportation was not "mature" and "therefore not susceptible of judicial review" (at 114). Prior to Presidential approval, a Board decision is not "a final determination even of the Board's ultimate action." Such an administrative decision "has only the force of a recommendation to the President" (at 113).

As this Court later explained in American Airlines, Inc. v. Civil Aeronautics Board, 121 U.S.App.D.C. 120,

348 F.2d 351, 352 (1965), the President may approve such a route award on the basis of "broad 'evidentiary' policy factors not involved, and indeed not relevant, in Board proceedings." There are here no "extrajudicial factors" or "unreviewable discretion" affecting the merits of the electric rate increase in the District of Columbia.

Nor does this case remotely resemble Fort Harrison Telecasting Corp. v. Federal Communications Commission, 111 U.S.App.D.C. 368, 297 F.2d 779 (1961), also cited by the company. In that case the appellant corporation was not adversely affected when the Federal Communications Commission returned its application for a license to operate a television channel without prejudice to its renewal when the channel should become available. The application for the channel simply had been "prematurely tendered" to the FCC (see 297 F.2d at 781).

The company argues that an appeal of a Phase I order authorizing and directing a general increase would be premature, since the filing of an appeal would somehow "dictate" that the Phase II order should be held in abeyance, thereby delaying any rate changes(Brief, p. 26). The statement is a non sequitur. The mere filing of an appeal does not automatically stay the effectiveness of rates and accordingly would not prevent the Commission

from adjusting rates pending that appeal. In fact it is quite typical that changes in rates may occur pending judicial review of an earlier increase; and hence the phrase "locked-in period" refers to a period of effectiveness of rates in litigation that have been superceded for the future by other rates.

We have cited in our prior brief (p. 18) the several cases in this jurisdiction holding a general revenue order of the Interstate Commerce Commission, that (1) contains no direction to any carrier, and (2) preserves the right to seek reparation for past unlawful rates in a complaint proceeding, is nevertheless appealable. No repetition of those cases is necessary. We do urge that the appealability of Orders 5429 and 5434 follows a fortiori from the appealability of such Interstate Commerce Commission orders.

Respectfully submitted,

LEONARD S. GOODMAN

7119 Sixteenth St., N.W.
Washington, D.C. 20012

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